

***United States Court of Appeals
for the Second Circuit***



APPENDIX

1-21
ORIGINAL

77-6103

United States Court of Appeals
For the Second Circuit

Docket No. 77-6103

W. J. USERY, JR., Secretary of Labor, U.S. Dept. of Labor,
Plaintiff-Appellee,
v.

NORTHWEST ORIENT AIRLINES, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX—VOLUME I

Pages A-1 to A-152

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PAGINATION AS IN ORIGINAL COPY

INDEX

Docket Entries.....	A-1
Summons.....	A-3
Complaint.....	A-4
Answer.....	A-9
Order to show cause..... Dated December 2, 1976	A-15
Affidavit of Peter van Schaick support of plaintiff's application for an order to show cause..	A-17
Exhibits annexed to affidavit of Peter van Schaick	
A - Citations for violations found at Hanger number # 1.....	A-22
B - Application for warrant for inspection and inspection warrant signed b4 magistrate Vincent Catoggio.....	A-29
C - Decision of administrative law Judge Jerome Ditore.....	A-36
D - Magistrate Catoggio's written indication that the inspection warrant be quashed.....	A-58
Affidavit of William E. Huskins, Jr. in opposition to plaintiff's motion to reinstate inspection warrant.....	A-59
Affidavit of James A. Abbott in opposition to plaintiff's motion to reinstate inspection warrant.....	A-76
Transcript of minutes dated December 20, 1977 before Hon. Edward R. Neaher, U.S.D.J.....	A-123
Notice of Appeal.....	A-133
Order to show cause dated June 20, 1977.....	A-135
Memorandum and order dated July 5, 1977 of Hon. Edward R. Neaher.....	A-143

Notice of appeal
June 13, 1977.....A-145

Stipulation and order
consolidating appeals.....A-147

Letter from James Nespole to
Hon. Edward R. Neaher, U.S.D.J.,
dated January 13, 1977.....A-149

Letter from Francis V. LaRuffa to
Hon. Edward R. Neaher, U.S.D.J., dated
February 4, 1977.....A-151

Exhibits annexed to Affidavits
of William E. Huskins, Jr. and
James A. Abbott

- 1 - Order of Magistrate Catoggio dated
November 5, 1976.....A-153
- 2 - Station Facilities, Refueling
Equipment and Fuels.....A-154
- 3 - Portable Ground and Power
Equipment.....A-160
- 4 - Cable Inspection and Equipment.....A-191
- 5 - Oxygen Equipment.....A-197
- 6 - Dry Ice Handling Precautions.....A-200
- 7 - Jet Aircraft Noise, Ingestion and
Exhaust Precautions.....A-201
- 8 - Pushing and Towing of Aircraft.....A-203
- 9 - Handling of Radio-Active Shipments
in case of Accident of Spillage.....A-206
- 10- Personal Protection from Harmful
Materials.....A-214
- 11- Hanger and Ramp Practices - fire
precaution.....A-215
- 12- Erecting Scaffolding for Aircraft
Repainting or polishing.....A-215a
- 13- Hanger Floor Cleaning.....A-223

14- Memoranda and Safety Documents monthly Safety Meeting.....	A-225
15- Ramp Safety Procedures.....	A-290
16- Load Control - Description of Function.....	A-293
17- Operational Control.....	A-296
18- Preparation of Weight Distribution.....	A-298
19- Transportation of Animals and Perishable shipments.....	A-303
20- Weight and Balancing Training.....	A-315
21- Acceptable and Non-Acceptable Shipments including Descriptions as to Handling of Dangerous Cargo.....	A-317
22- Cargo Loading Precautions.....	A-343
23- Regulation and Procedure Operation Qualifications - Motorized Equipment.....	A-351
24- Northwest's Motion for an Order Dismissing Administrative Proceedings.....	A-353
25- Petition for Discretionary Review.....	A-355
26- Commissioner Cleary's Direction for Review.....	A-360

LABR

NORTHWEST ORIENT AIRLINES, INC.

W.J.USERY, JR., SECRETARY OF LABOR
UNITED STATES DEPARTMETN OF LABOR

NORTHWEST ORIENT AIRLINES, INC.

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ACTION to enforce 29 USC 657(a) giving ^{CAUSE} the Secretary of Labor the right to inspect without delay any workplace of an employer - deft has refused to ~~xxx~~ permit entry for inspection.

Related case : 76M 2319 (Magistrate CATOGGIO)

ATTORNEYS

For Plntff:

FRANCIS V. LaRUFFA, Regional Solicitor
US DEPT OF LABOR ROOM 3555
1515 BROADWAY, NY NY 10036
BY: Peter van Schaick, esq.
399-5921

For DEFT:

James Nespole & Reginald Hau
REAVIS & McGRATH
1 CHASE MANHATTAN PLAZA
NEW YORK, NY 10005
269-7600

☐ CHECK HERE IF CASE WAS FILED IN FORMA

FILING FEES PAID			STATISTICAL CARDS	
DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
			JS-6	
			JS-6	

LABR vs NORTHWEST ORIENT AIRLINES

DATE	NR.	PROCEEDINGS
1-76		Complaint filed. Surmons issued. (1)
13-76		By DOOLINGJ-Memo Order dtd 12-10-76 that the hearing of the otsc will be heard 12-20-76 filed. (2)
-17-76		By NEAHER, J.--Order to show cause dtd 12-2-76 ret. 12-30-76 for an order directing the U.S. Magistrate to reinstate the inspection wasrent, etc. filed. without proof of service. (3)
/21/76 m 20		Before Neaheer, J--case called--attys for both sides present--pltffs motion for an order to show cause why a search warrant vacated by Mag Catoggio should not be reinstated--argued--decision reserved (4)
/21/76		Affidavit of William E. Huskins, Jr. in opposition to pltff's motion for an order directing U.S. Mag. Catoggio to reinstate an inspection warrant previously vacated filed., with exhibits attached. (5)
/21/76		Defts memo of law filed. (6)
-22-76		ANSWER filed. (7)
12-77		Sten. transcript dtd 12-20-76 filed. (8)
14/77		Letter of James Nespole to Neaheer, J dtd 1/13/77 filed re an unpublished judgement and memo decision and order dtd 12/30/76 of a Three-Judge Court of the US.D.C. of Idaho in an another action (copies attached) which has has bearing on the right XX of OSHA TO conduct a search etc. (9)
-11-77		By NEAHER, J. - Memorandum and Order dtd 6-10-77 directing the Magistrate to reinstate the inspection warrant for deft's Hangar No. 1 filed. Copies forwarded as directed. mm (10)
17/77		Notice of appeal filed. - Docket entries and duplicate of notice of appeal mailed to the C of A. tk (11)
/20/77		Before NEAHER, J. Case called. Attys. for both sides present. Order to show cause-- signed. Case adjourned to 6/29/77. lg.
/27/77		Def's MEMORANDUM OF LAW in support of its application for reargument and reconsideration of Court's order dtd 6/10/77 and a stay of such order pending hearing & determination of the present motion filed. (12)
6-28-77		By NEAHER, J.--Order to show cause dtd. 6-20-77 ret. 6-29-77 for an order granting leave for deft to reargue pltff's applciation filed without proof of service. ld (13)
30/77		Certiified copy of scheduling order received from the C of A . tk (14)
-6-77		By NEAHER, J-Memo order dtd 7-5-77 denying deft's motion for re-argument..The operation of the order of 6-10-77 is stayed pending determination of deft's appeal filed. mg Copies mailed. (15)
-12-77		Memorandum of law for the Secretary of Labor filed. mg (16)
-12-77		Affidavit of Peter van Schaick in support of pltff's application for order to show cause filed. mg (17)

B

United States District Court

A 3

FOR THE

SOUTHERN DISTRICT OF NEW YORK

76C 2177

CIVIL ACTION FILE NO.

W. J. HENRY, JR., SECRETARY OF LABOR
United States Department of Labor

Plaintiff

v.

SUMMONS

NORTH EGG AIRLINES, INC.,

Defendant

To the above named Defendant :

You are hereby summoned and required to serve upon

Francis V. LaRuffa
Regional Solicitor

plaintiff's attorney , whose address is:

U. S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

LEWIS ORGER

Clerk of Court.

MAELLYN GLENN

Deputy Clerk.

Date: 12-1-76

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

12-1-76

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

W. J. USERY, JR., Secretary of Labor, :
United States Department of Labor, :
Plaintiff, :

Civil Action
File No.

v.

NORTHWEST ORIENT AIRLINES, INC., :
Defendant.

C O M P L A I N T

I. Jurisdiction

1. This matter is before the Court on an application of the Secretary of Labor, United States Department of Labor brought pursuant to Sections 1337 and 1345 of Title 28 of the United States Code to enforce Section 657(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., which grants the Secretary of Labor the right to enter and inspect without delay any workplace of an employer.

II. The Parties

2. Plaintiff, W. J. Usery, Jr., is the Secretary of Labor, United States Department of Labor. He has overall responsibility for the administration of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) hereinafter referred to as the Act, including the authority to enter, inspect and investigate places of employment in order to determine if employers are in compliance with the Act.

3. Defendant Northwest Orient Airlines, Inc., is a corporation doing business in Jamaica, Queens County, New York within the jurisdiction of this Court, where it is engaged in a business affecting interstate commerce.

III. Statement of Facts

4. On October 27, 1976, Effraim Zoldan, a duly authorized Compliance Officer of the Occupational Safety and Health Administration, presented his credentials to the agent in charge of an

operation of Northwest Orient Airlines, Inc., located at Hanger 1, John F. Kennedy International Airport, Queens County, New York. Notwithstanding his clear statutory authority to enter without delay, the agent in charge refused to allow Mr. Zoldan's entry.

5. On November 4, 1976 upon application of Mr. Zoldan for the Secretary of Labor, Magistrate Vincent Catoggio issued an inspection warrant authorizing the inspection of Northwest Orient Airline's facility to take place. A copy of the Application and Warrant is attached to the attorney's affidavit as Exhibit B.

6. On November 5, 1976, Mr. Zoldan again attempted to gain entry to the Northwest Orient Airlines workplace pursuant to the warrant to conduct an inspection and again he was refused entry.

7. On November 5, 1976, counsel for Northwest Orient Airlines notified the Secretary of Labor that counsel would appear before the Magistrate Catoggio and argue that the warrant be quashed. Counsel for both the employer and the Secretary of Labor thereafter appeared before the Magistrate.

8. After argument, the Magistrate vacated the Inspection Warrant with the following statement:

"Vacated in view of FAA pre-empting at least part of the area as indicated to me today for the first time as per decision of Administrative Judge Ditore, September 28, 1976."

(Exhibit C in the attorney's affidavit is a copy of the decision referred to above; Exhibit D is a copy of the Magistrate's written indication that he vacated the inspection warrant.) The Secretary of Labor took exception to the Magistrate's action, contending that any arguable FAA authority to protect ground maintenance employees from safety hazards while working on aircraft was limited to those facts, and could not be the basis for a blanket

exemption from OSHA coverage of all the different working conditions of the employer. At this time, the parties to the action agreed that the issue would be resolved before a Judge of the United States District Court.

9. Defendants refusal to permit the Occupational Safety and Health inspection by United States Department of Labor Compliance Officers interferes with the Secretary of Labor's duty to determine whether the respondents are in compliance with section 5(a) of the Act (29 U.S.C. 654(a)) which requires employers to:

"(a) (1) . . . furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) . . . comply with Occupational Safety and Health Standards promulgated under this Act.:

10. The authority for issuance of the Order herein sought is section 8(a) of the Act which provides:

"In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized -

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer, and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

11. The inspection and investigation will be conducted during regular working hours or at other reasonable times and in reasonable limits and in a reasonable manner. The Secretary of Labor's representatives will present their credentials to the employer and the inspection and investigation will be commenced

as soon as practicable after issuance and service of the Order sought hereby and with reasonable promptness and in a reasonable manner.

12. The inspection and investigation will extend to the establishment or other area, workplace, or environment where work is performed by employees of these employers, and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls and facilities) bearing on whether these employers are furnishing to employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees, and whether these employers are complying with the Occupational Safety and Health Standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act.

IV Prayer for Relief

WHEREFORE, the plaintiff requests that the Court

1. Grant an Order directing the United States Magistrate to reinstate the inspection warrant previously applied for by the Secretary of Labor; or
2. Grant an Order compelling inspection under the Occupational Safety and Health Act of 1970; or
3. Issue a Warrant for inspection under the Occupational Safety and Health Act of 1970;

and that this Court further order the employer, Northwest Orient Airlines, Inc., to permit the requested inspection, and grant such other relief as may be just and appropriate under the circumstances.

DATED: New York, New York
1976

/s/ William J. Kilberg
WILLIAM J. KILBERG
Solicitor of Labor

/s/ Francis V. La Ruffa
FRANCIS V. LA RUFFA
Regional Solicitor

/s/ Stephen D. Duvernoy
STEPHEN D. DUVERNOY
Attorney

/s/ Peter van Schaick
PETER van SCHAICK
Attorney

U. S. Department of Labor
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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-----X
W. J. USERY, JR., Secretary of Labor
United States Department of Labor,

: 76 Civ. 2177
: (E.R.N.)

Plaintiff,

:

-against-

:

ANSWER

NORTHWEST ORIENT AIRLINES, INC.,

:

Defendant.

:

-----X

Defendant Northwest Airlines, Inc. (incorrectly named herein
as Northwest Orient Airlines, Inc.) by its attorneys for its answer
to the complaint herein alleges as follows:

1. Denies each and every allegation contained in paragraph
1 of the complaint, except admits that said paragraph purports to
allege that this action was instituted pursuant to Sections 1337
and 1345 of Title 28 of the United States Code to enforce
Section 657(a) of the Occupational Safety and Health Act of 1970.

2. States that it lacks knowledge or information
sufficient to form a belief as to the truth of the allegations
contained in paragraph 2 of the complaint.

3. Denies each and every allegation contained in paragraph 4 of the complaint, except admits that on or about October 27, 1976 a representative of the Occupational Safety and Health Administration ("OSHA") sought to inspect defendant's facilities located in Hangar 1 at John F. Kennedy International Airport, Queens, New York.

4. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint, except admits that on November 4, 1976 Magistrate Vincent Catoggio issued an inspection warrant concerning an inspection OSHA sought to make of defendant's facilities. Defendant further states that it lacks knowledge or information sufficient to form a belief as to the contents of the attorney's "affidavit" since that affidavit is not annexed to the complaint nor identified in any other manner or form.

5. Denies each and every allegation contained in paragraph 6 of the complaint.

6. Denies each and every allegation contained in paragraph 8 of the complaint, except admits that Magistrate Catoggio vacated the inspection warrant and held as follows:

Vacated in view of FAA pre-empting at least part of the area as indicated to me today for the first time as per decision of Administrative Judge Ditore, September 28, 1976.

A 11

and that the Secretary of Labor contended before the Magistrate that any arguable Federal Aviation Administration authority to protect ground maintenance employees from safety hazards while working on aircraft was limited to those facts and could not be the basis for a blanket exemption from OSHA coverage of all the different working conditions of the employer. Defendant is unable to admit or deny the allegations concerning the content of the attorney's "affidavit" since that affidavit is not annexed to the complaint nor identified in any other manner or form.

7. Denies each and every allegation contained in paragraphs 9 and 10 of the complaint, and insofar as those allegations purport to contain sections of the Occupational Safety and Health Act of 1970, the defendant respectfully refers the Court to those provisions for the text and legal effect thereof.

8. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 11 and 12 of the complaint.

FIRST AFFIRMATIVE DEFENSE

9. The complaint fails to set forth facts sufficient to constitute any claim for relief.

SECOND AFFIRMATIVE DEFENSE

10. The complaint fails to set forth a sufficient showing of probable cause in that:

(a) OSHA's jurisdiction over the working conditions at Hangar No. 1 have been pre-empted by the Federal Aviation Administration by rules and regulations affecting such working conditions that have been adopted by the Federal Aviation Administration pursuant to the Federal Aviation Act of 1958.

(b) No facts have been alleged to demonstrate probable cause exists to believe that the Occupational Safety and Health Act of 1970 is being violated.

THIRD AFFIRMATIVE DEFENSE

11. Plaintiff is barred by the doctrine of res judicata from seeking to inspect defendant's premises in that on or about September 28, 1976 in a proceeding conducted under the Occupational Safety and Health Act of 1970 Administrative Law Judge Jerome C. Ditore determined OSHA had no jurisdiction over Northwest's maintenance employees and that Northwest was not subject to the provisions of the Act by virtue of defendant's extensive regulation by the Federal Aviation Administration under the Federal Aviation Act of 1958.

WHEREFORE, defendants demands judgment dismissal the complaint together with the costs and disbursements of this action.

DATED: New York, New York
December 21, 1976

REAVIS & McGRATH

By

James Nespoli
A Member of the Firm

Attorneys for Defendant
1 Chase Manhattan Plaza
New York, New York 10005

New York, N. Y.

AFFIRMATION OF SERVICE BY MAIL

, 19 , an attorney admitted
to practice in the Courts of the State of New York affirms under the penalties of perjury that on
, 19 , I served a copy of the within upon:

by depositing the same in an enclosed post-paid properly addressed envelope in an official United States Postal Service depository at 1 Chase Manhattan Plaza, New York, N.Y. 10005, directed to said attorney(s) at the address(es) above stated.

STATE OF NEW YORK, COUNTY OF NEW YORK

s.s.:

AFFIDAVIT OF SERVICE BY MAIL

I am not a party to this action. On **PATRICIA KOSTOVICH**, being duly sworn, states:
December 21, 1976, I served a copy of the within upon:

Francis V. LaRuffa, Regional Solicitor, U.S. Department of Labor,
1515 Broadway, Room 3555, New York, New York

by depositing the same in an enclosed post-paid properly addressed envelope in an official United States Postal Service depository at 1 Chase Manhattan Plaza, New York, N.Y. 10005, directed to said attorney(s) at the address(es) above stated.

Sworn to before me this 21 day
of December, 1976

DAVID C. BIRDOFF
Notary Public, State of New York
No. 30,000,015
Qualified in Nassau County
Certificate filed in New York County
Commission expires March 30, 1977

PATRICIA KOSTOVICH

STATE OF NEW YORK, COUNTY OF NEW YORK

s.s.:

AFFIDAVIT OF PERSONAL SERVICE

I am not a party to the action. On , 19 , I served a copy of the within upon:
, being duly sworn states:

by delivering to and leaving personally with the aforementioned at the address appearing above a true copy thereof.
Sworn to before me this day
of , 19

Order to Show Cause dated December 2, 1976
Directing the United States Magistrate To
Reinstate Inspection Warrant.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

NEAHER, J.

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15

W. J. USERY, JR., Secretary of Labor,
United States Department of Labor,

: Civil Action

Plaintiff,

: File No.

v.

NORTHWEST ORIENT AIRLINES, INC.,

Defendant.

76C 2177

ORDER TO SHOW CAUSE

This matter is before the Court on application of the Secretary of Labor, United States Department of Labor brought pursuant to Sections 1337 and 1345 of Title 28 of the United States Code to enforce Section 657(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., which grants the Secretary of Labor the right to enter and inspect without delay any workplace of an employer. Compliance Officers of the Occupational Safety and Health Administration attempted to make the inspection authorized by section 657(a) of title 29 of the United States Code, and were refused entry into Northwest Orient Airlines' Hanger No. 1, at JFK International Airport in Jamaica, Queens County, New York.

Upon consideration of the fact that this matter is one dealing with the Occupational Safety and Health of employees of Northwest Orient Airlines, Inc., and upon consideration of the affidavit of Peter van Schaick, Esq., one of the attorneys for Plaintiff, duly sworn to the 1st day of December 1976, and the memorandum of law and other papers submitted herein, it is hereby

ORDERED that the defendant herein, Northwest Orient Airlines, Inc., appear before the Court on the 14 day of December, 1976, at 9:30 a.m. in Room 2 of the United States District Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, and show cause why this Court should not issue either an Order directing the United States Magistrate to reinstate the inspection warrant previously applied for by the Secretary of Labor, or in the alternative why this Court should not issue its own order compelling inspection or issue its own inspection warrant, and further why this Court should not direct the employer, Northwest Orient Airlines, Inc., to permit the requested inspection, and grant such other and further relief as may be just and appropriate under the circumstances.

It is further ordered that a copy of this order, together with a copy of all other papers submitted in this proceeding be personally served by an employee or agent of the United States Department of Labor upon any officer, responsible official or managing agent of Northwest Orient Airlines, Inc., on or before December 3, 1976.

DATED: Brooklyn, New York
December 3, 1976

/s/ Edward R. Neaher
UNITED STATES DISTRICT JUDGE

Affidavit of Peter van Schaick, Esq., dated
December 1, 1976 In Support of Plaintiff's
Application For An Order to Show Cause To
Reinstate Inspection Warrant.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

NEAHER, J.

A 17

W. J. USERY, JR., Secretary of Labor, :
United States Department of Labor

Civil Action

Plaintiff, :

File No.

v.

NORTHWEST ORIENT AIRLINES, INC., :

76C 2177

Defendant.

Affidavit of Peter van Schaick, Esq.
In Support of Plaintiff's Application
For An Order To Show Cause

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

PETER van SCHAICK, Esq., being duly sworn, deposes
and says:

1. I am an attorney in the Office of the Solicitor,
United States Department of Labor, 1515 Broadway, New York,
New York and I am fully familiar with the facts and proceedings
in the instant case and make this affidavit in support of the
Plaintiff's application for relief from defendant's refusal to
allow an inspection of its workplace as authorized under the
Occupational Safety and Health Act of 1970.

2. This action is commenced by order to show cause
to further the congressional aim that inspections made pursuant
to 29 U.S.C. 657(a) be made without delay to protect the Occupa-
tional Safety and Health of employees of defendant.

3. On information and belief, this establishment has
been inspected on at least two occasions by the Occupational
Safety and Health Administration: on February 18, 1975, and
on March 11, 1975. Each inspection revealed numerous violations.
The establishment violated the National Electrical Code by ex-
posing employees to live wires, damaged electrical cables, and

12-1-76

ungrounded equipment. It also violated standards governing personal protective equipment by failing to provide safety shoes. In total, the workplace was cited for 13 violations of the standards promulgated pursuant to the Occupational Safety and Health Act. The defendant initially contested these citations but thereafter withdrew notice of contest and paid the proposed penalty. These citations thereafter became a final order of the Occupational Safety and Health Review Commission. Copies of the two citations are attached hereto and called Exhibit A.

4. On information and belief, the Bureau of Labor Statistics has analyzed industrial injury rates and concluded that certificated carriers in the air transportation industry such as this establishment, have the seventeenth highest injury rate out of the ninety industries analyzed. The industry's prominent place on this list has caused the Occupational Safety and Health Administration to assign priority to inspection of establishments in this industry.

5. On October 27, 1976, Efraim Zoldan, a duly authorized Compliance Officer of the Occupational Safety and Health Administration, presented his credentials to the agent in charge of an operation of Northwest Orient Airlines, Inc., located at Hanger 1, John F. Kennedy International Airport, Queens, Queens County, New York. Notwithstanding his clear statutory authority to enter without delay, the agent in charge refused to allow Mr. Zoldan's entry.

6. On November 4, 1976, I accompanied Mr. Zoldan before United States Magistrate Vincent Catoggio to obtain an inspection warrant for the workplace of defendant's identified as Northwest Orient Airlines, Inc., Hanger No. 1, JFK International Airport, Jamaica, Queens County, New York. Based upon Mr. Zoldan's sworn application for the Secretary of Labor, Magistrate Catoggio issued an inspection warrant authorizing the inspection of Northwest Orient Airline's facility to take place. A copy of the application and warrant is attached hereby and made a part hereof as Exhibit B.

7. On November 5, 1976, Mr. Zoldan, again attempted to gain entry to the Northwest Orient Airlines workplace to conduct an inspection. Again, he was refused entry. Later in the day on November 5, 1976, local counsel for Northwest Orient Airlines notified the Secretary of Labor that counsel would appear before the Magistrate who had issued the inspection warrant and orally argued that the warrant be quashed. Counsel for both the employer and the Secretary of Labor appeared and argued before Magistrate Catoggio.

8. Counsel for the employer presented the Magistrate with a copy of a decision by an Occupational Safety and Health Review Commission Administrative Law Judge. In that case, Administrative Law Judge Jerome C. Ditore sustained an affirmative defense raised by the employer to a citation for a certain specified violation of the Act. The employer was charged with failing to provide adequate means to protect its ground maintenance employees from the hazard of being crushed by the electro-pneumatically controlled leading edge flaps of Boeing 747 aircraft when performing maintenance landing light work in the leading edge flap cavities of the planes. The employer's defense was that the specific working-condition, which was the focus of the citation, was regulated by the Federal Aviation Administration, and that the Occupational Safety and Health Administration was pre-empted from enforcing that particular citation by section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1). (See footnotes 3 and 4 of memorandum of law). The administrative law judge held in favor of the employer on this narrow point. A copy of this decision is attached hereto and made a part hereof as Exhibit C. In presenting this decision to the Magistrate, the employer argued that the decision supported the proposition that section 4(b)(1) of the Act pre-empted the Secretary from inspecting those facilities.

The basis for this argument appeared to be that since the Federal Aviation Administration regulated certain aspects of that employer's workplace, the entire workplace was therefore exempt from OSHA inspections.

9. The Secretary of Labor argued before the Magistrate that the Administrative Law Judge's opinion was not dispositive of the issue presented. First, the decision is not a Final Order of the Commission, but is under appeal by the Secretary of Labor. Furthermore, the decision is limited to one particular set of working conditions which occur on the airplanes themselves; whereas, the inspection specified in the warrant is for the general inspection of Aircraft Hanger 1. Finally, the Secretary argued that a motion before a Magistrate to quash a warrant was not the proper forum in which to raise an exemption issue concerning particular working conditions; rather, the administrative tribunal was the proper forum.

10. After argument, the Magistrate vacated the inspection warrant with the following statement:

"Vacated in view of FAA pre-empting at least part of the area as indicated to me today for the first time as per decision of Administrative Judge Ditore, September 28, 1976."

A copy of the warrant with the Magistrate's vacation is attached hereto and made a part hereof as Exhibit D.

11. No previous application has been made to the District Court for the specific relief requested herein.

Peter van Schaick
 PETER van SCHAICK
 Attorney

Sworn to before me on
 this 1st day of December 1976

Joanne T. Taiter
 NOTARY PUBLIC

JOANNE T. TAITER
 Notary Public, State of New York
 Commission Expires 12/31/78

Exhibit A

Annexed to Affidavit of Peter van Schaick
Citations for violations found at Hangar
Number 1, a facility of defendants, on
February 18, 1975 and March 11, 1975.

Citations for violations found
at Manger Number 1, a facility
of defendants, on February 18,
1975 and March 11, 1975.

A-27

EXHIBIT A

U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
SAFETY AND HEALTH OR ACCIDENT INSPECTION REPORT

1. CSHO NO. 4174102A
2. REGION 22
3. CSHO NO. 6068512361
4. REPORT NO.

5. INSPECTION DATES
FROM MO. DAY YR. 10/1/75 TO MO. DAY YR. 10/1/75 6. SIC 4511

7. ESTABLISHMENT NAME (print legal name)
NORTHWEST AIRLINES INC. CARGO SERVICES

8. SITE LOCATION
HAWAIIAN / JFK INTERNATIONAL AIRPORT

9. CITY JAMAICA 10. STATE NY 11. ZIP CODE 11430 12. CITY CODE 4174 13. ST. CD. B6 14. CNTY. CODE 081

15. NAME OF CONTROLLING CORPORATION, PARTNER OR SOLE OWNER
NORTHWEST AIRLINES INC. 16. TELEPHONE NUMBER 212-656-5281

17. CITATION MAILING ADDRESS IF DIFFERENT FROM ABOVE

18. TYPE OF INSPECTION:
Accident ☐ Complaint ☐ General ☐ Schedule ☐ Follow-up ☒

19. SPECIAL PROGRAMS:
TIP ☐ THNP ☐ Other ☐ Health ☐ Special ☐ Emphasis ☐ Other ☐

20. If a previous OSHA inspection has been made in this establishment enter the id of the first OSHA inspection:
Region 02 Area 4174
CSHO NBR 606851 REPORT NBR 222100 FY/00 00

21. Check this box if OSHA training received by establishment ☐

22. NUMBER OF EMPLOYEES
Employed in Establishment 112 Covered by Inspection 113
CONTROLLED BY EMPLOYER
0-19 ☐ 20-99 ☐ OVER 99 ☒

23. ADVANCE NOTICE:
☐ Given
☐ Adversely affected inspection in opinion of CSHO
☐ Employee stated Adverse Affect

24. Check this box if an employee representative exercised walk around privileges during this inspection ☐

25. NUMBER INJURY OR HEALTH HAZARDS NOT COVERED BY A STANDARD 1

Date Case Completed
MO. DAY YR. 10/1/75
☐ Abatement Completed
☐ Penalties Paid
Follow-up inspection id
CSHO NBR REPORT NO. 019

26. Enter related complaint log numbers

27. Enter "total-occupational injuries and illnesses" from the OSHA 102

LOST WORKDAYS				NO LOST WORKDAYS			
Cal Yr.	Fatalities	No. of Cases	Job Term or Transfer	Lost Workdays	No. of Cases	Job Term or Transfer	
<u>74</u>	<u>0</u>	<u>76</u>	<u>0</u>	<u>689</u>	<u>44</u>	<u>0</u>	

28. Enter cross reference codes if desired for this inspection:

29. OSHA-36 Prelim. Report Nbr 1

30. Date of Accident
MO. DAY YR. 10/1/75

31. Nbr. Deaths 1 32. Hospitalized Injuries 1 33. Non-hospitalized Injuries 1

34. Injured/Deceased

Line	Line Nbr	Part	Dispos.	Nature of Inj.	Body of Inj.	Event	Envir.	Human Factor	Task	Equipment	Substance
01											
02											
03											
04											
05											

35. CSHO Name Arthur Lind Date 10/1/75 M. 10/1/75 P. 10/1/75 4-2-75
23 AREA OFFICE
Prop. Rev. OSHA - 1
6/74

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CITATION NO.	OSHA-1 (10)
10035	222
AREA	REGIONS
4174	2

CITATION

370 OLD COUNTRY INTAD
GARDEN CITY, N. Y. 11530

TO: 2.

Northwest Airlines, Inc.
Cargo Svcs. Hangar #1
JFK Intl. Airport
Jamaica, N.Y. 11430

3. Citation Number One

4. Page 1 of 5

TYPE OF ALLEGED VIOLATION(S): Non-serious

An inspection was made on February 18, 19 75 of a place of employment located at:
Above address

Airline cargo terminal and described as follows:

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, U.S.C. 651 *et seq.*, in the following respects:

11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
Federal Register 6/27/74 29 CFR 1904.5(a)	OSHA Form 102, Annual Summary of Occupational Injuries and Illnesses, was not posted or available for review in the establishment in accordance with instructions as outlined in the OSHA Recordkeeping Requirements Booklet.	Immediately upon receipt of citation.
1910.37(q)(1) Page 23533	The following exits are not marked by readily visible signs: A) Second floor office B) Exit from warehouse near information center. C) Exit from south east stairway to alley. D) Exit from CIC to parking area.	3/26/75
1910.22(b)(2) Page 23508	Permant aisles are not marked in the warehouse where fork lift trucks are used.	3/26/75
1910.22(a)(2) Page 23508	The floor in the south east corner of the warehouse is slippery due to accumulations of grease & water.	3/26/75
1910.157(c)(1)(iv) Page 23683	Fire extinguishers for occupancy hazards are not provided as specified in tables L-1 and L-2. A) In the warehouse, where gasoline operated trucks are used. (Type B) B) In the agents office, where teletype equipment is used. (types A&C)	Immediately upon receipt of citation.

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near the place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days*, whichever period is longer.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days* of the issuance of this citation.
No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 661, 660(c)(1).

* Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

1.

CITATION

370 OLD COUNTRY ROAD
GARDEN CITY, N. Y. 11530

CSHO NO.	OSHA-100
L0085	222
AREA	REGION
4174	2

A 24

TO: 2.

Northwest Airlines, Inc.
Cargo Svcs. Hangar #1
JFK Intl. Airport
Jamaica, N.Y. 11430

3. Citation Number One

4. Page 2 of 5. 2

TYPE OF ALLEGED VIOLATION(S): Non-serious

An inspection was made on February 18, 19 75 of a place of employment located at:

Above address

and described as follows:

Airline cargo terminal

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., in the following respects:

11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
1910.178 (m) (5) (iii) Page 23696	Brakes were not set by 3 dismounted operators of industrial trucks.	Immediately upon receipt of citation.
1910.132(a) Page 23670	Foot protection was not used by cargo handling employees who are subject to the hazard of foot injuries.	4/16/75

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days*, whichever period is longer.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days* of the issuance of this citation.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1).

*Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
SAFETY AND HEALTH INSPECTION REPORT

417402
400851230

INSPECTION DATES FROM NO. DAY YR. NO. DAY YR. 6. SIC 4511 25

ESTABLISHMENT NAME (print legal name) NORTHWEST AIRLINES, INC AIRCRAFT MAINTENANCE

SITE LOCATION HANGAR 1 & PASSENGER TERMINAL JFK INT. APT

CITY JAMAICA 10. STATE NY 11. ZIP CODE 11430 12. CITY CODE 4174 13. ST. CD. 36 14. CNTY. CODE 081

5. NAME OF CONTROLLING CORPORATION, PARTNER OR SOLE OWNER NORTHWEST AIRLINES INC. 16. TELEPHONE NUMBER 712-656-5984

17. CITATION MAILING ADDRESS IF DIFFERENT FROM ABOVE AIRCRAFT MAINTENANCE, HANGAR 1, JFK INTERNATIONAL AIRPORT

18. TYPE OF INSPECTION:
☐ Accident ☐ Complaint ☒ General Schedule Follow-up

19. SPECIAL PROGRAMS:
 TIP ☐ THHP ☐ Other Health ☐ Special Emphasis ☐ Other ☐

20. If a previous OSHA inspection has been made in this establishment enter the id of the first OSHA inspection:
 Region Area
 CSHO NBR REPORT NBR FY/00

21. Check this box if OSHA training received by establishment ☐

22. NUMBER OF EMPLOYEES
 Employed in Establishment 38 Covered by Inspection 38
 CONTROLLED BY EMPLOYER
 0-19 ☐ 20-99 ☐ OVER 99 ☒

23. ADVANCE NOTICE:
☐ Given
☐ Adversely affected inspection in opinion of CSHO
☐ Employee stated Adverse Affect

24. Check this box if an employee representative exercised walk around privileges during this inspection ☐

25. NUMBER INJURY OR HEALTH HAZARDS NOT COVERED BY A STANDARD

Date Case Completed
 MO. 11 DAY 02 YR. 75
☒ Abatements Completed
☒ Penalties Paid
 Follow-Up inspection id
 CSHO NBR REPORT NO.

26. Enter related complaint log numbers

27. Enter "total-occupational injuries and illnesses" from the OSHA 102

Cal Yr.	LOST WORKDAYS			NO LOST WORKDAYS		
	Fatalities	No. of Cases	Job Term or Transfer	Lost Workdays	No. of Cases	Job Term or Transfer
<u>74</u>	<u>0</u>	<u>10</u>	<u>0</u>	<u>98</u>	<u>14</u>	<u>0</u>

28. Enter cross reference codes if desired for this inspection:

29. OSHA-36 Prelim. Report Nbr

30. Date of Accident
 MO. DAY YR.

31. Nbr. Deaths

32. Hospitalized Injuries

33. Non-hospitalized Injuries

34. Injured/Deceased

Line	Inj. Name	Disp. Code	Nature of Inj.	Part of Body	Source of Inj.	Event Type	Contr. Factor	Contr. Factor	Haz. Subst.
01									
02									
03									
04									
05									

CSHO Arthur Lind Date 3/13/75 Date 3/12/75

AREA OFFICE

Prop. Rev. OSHA - 1 6/74

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CITATION

OSHA NO.	OSHA-110	11
L0085	230	00
AREA	REGION	
4174	2	

370 OLD COUNTRY ROAD
GARDEN CITY, N. Y. 11530

TO: 2.

Northwest Airlines, Inc.
Maintenance Department
JFK Int'l Airport
Jamaica, NY 11430

3. Citation Number One

4. Page 1 of 5.

TYPE OF ALLEGED VIOLATION(S): Non-Serious

An inspection was made on March 11, 1975 of a place of employment located at:
Hangar #1 & Ramp at NW passenger terminal, JFK Int'l Airport

Aircraft & Industrial Vehicle Service Facility. and described as follows:

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, U.S.C. 651 et seq., in the following respects:

11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
Federal Register Dated June-27, -1974 29CFR		
1910.110(f)(2)(i) Page-23658	2-LP-Gas Cylinders were on the ramp at gates 3 and 4 where they were exposed to physical damage from industrial vehicles.	Immediately on receipt of this citation
1910.22(a)(1) Pg.-23508	Housekeeping was poor at the Gate 3 ramp. The area was littered with wood skids.	4/29/75
1910.11(a)(2) Page-23508	There were slippery grease deposits on the ramp at the Gate 3 parking area.	4/29/75
Nat'l Electric Code NFPA 70-1971, as adopted by 1910.309 (a) Article 110-17 Page 70-16	Live electrical parts operating at 220 volts were not protected from accidental contact at an open 3" x 5" box on the wall at Gate 3 approximately 6' from the IFO Power Unit.	Immediately on receipt of this citation
Nat'l Electric Code NFPA 70-1971, as adopted by 1910.309 (a) Article 250-45 (d)(1) Page 70-73	The non-current carrying metal parts of refrigerated equipment were not grounded: a. Admiral Refrigerator in the Ready Room b. Acme Refrigerator in the Crew Chiefs' Office	4/29/75
Nat'l Electric Code NFPA 70-1971, as adopted by 1910.309 (a) Article 400-1 Page 70-184	The interlock cable on the aircraft ground power supply cord at Gate 3 was not suitable for the conditions of use and location. Its insulation was damaged.	4/29/75

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near a place that an alleged violation referred to in the citation occurred. The citation must remain posted until all violations cited therein are corrected, or for 3 working days*, whichever period is longer.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days* of the issuance of this citation.
No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) The Occupational Safety and Health Act of 1970, 29 U.S.C. 661, 660(c)(1).

*The Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays, and holidays.

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

1.

CITATION

370 OLD COUNTRY ROAD
GARDEN CITY, N. Y. 11530

CSDO NO.	OSHA FILE NO.
10085	230 10
AREA	REGION
4174	2

A 27

TO: 2.

Northwest Airlines, Inc.
Maintenance Department
JFK Int'l Airport
Jamaica, NY 11430

3. Citation Number One

4. Page 2 of 6. 2

5. TYPE OF ALLEGED VIOLATION(S): Non-Serious

7. An inspection was made on March 11, 1975 of a place of employment located at:

3. Hangar #1 & Ramp at NW Passenger Terminal, Jfk Int'l Airport and described as follows:

4. Aircraft & Industrial vehicle service facility.

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., in the following respects:

Item number	11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
	Federal Register Dated June 27, 1974 29CFR.		
7	1910.132(a) Page-23670	Employees who work around materials handling equipment including fork lift trucks, and who handle heavy metal parts including pit covers, aircraft parts and truck parts, were not wearing foot protection.	5/29/75
8	1910.25(d)(1) Page-23515	Wood ladders were not maintained in good condition: a. On the ramp at Gate 3 the 4 step wood double ladder had a broken first step. b. In the Stock Room an 8 step, step ladder had a broken third step.	Immediately on receipt of this citation
9	1910.145(f)(i) Page-23680	The lower stair of the Clyde work stand at Gate 3 was broken free of its support and was not tagged "Defective".	Immediately on receipt of this citation
10	1910.215(a)(4) Page-23717	The work rest on the left side of the pedestal grinder in the Maintenance Shop, was 5/8" from the abrasive wheel.	4/29/75
11	Nat'l Electric Code NFPA 70-1971, as adopted by 1910.309(a) Article 250-45(D)(3) Page 70-73	The non current-carrying metal parts of the B&D portable sabre saw in the maintenance shop was not grounded.	4/29/75

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days*, whichever period is longer.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days* of the issuance of this citation.

*The person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1).

*Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays,

Exhibit B

Annexed to Affidavit of Peter van Schaik
Application for Warrant for Inspection and
Inspection Warrant signed by United States
Magistrate Vincent Catoggio.

Application for Warrant for
Application for Warrant for
Inspection and Inspection
Warrant signed by United
States Magistrate Vincent
Catoggio.

[Handwritten signature]

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

A 29

76 M 2319

IN THE MATTER OF:)

ESTABLISHMENT INSPECTION OF:)

Magistrate's Docket No. _____

Case No. _____

NORTHWEST ORIENT AIRLINES, INC.)
)
)
)
)
)

APPLICATION FOR INSPECTION WARRANT UNDER THE
OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

TO THE HONORABLE UNITED STATES MAGISTRATE:

Mr. Efraim Zoldan, a duly authorized compliance officer of the Occupational Safety and Health Administration, United States Department of Labor, hereby applies for an inspection warrant, pursuant to section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), hereinafter referred to as the Act, and the Regulations issued pursuant thereto (29 CFR 1903.3), for the inspection and investigation of the place of business of Northwest Orient Airlines, Inc. located at Hangar Number 1, JFK International Airport, Jamaica Queens County, New York, and described as follows: a business engaged in the operation of an international airline including cargo services and aircraft maintenance at that location.

1. This establishment houses the workplace of employees who are employed by an employer, engaged in a business affecting commerce, and is subject to the requirements of the Act.

2. The desired inspection is part of an inspection and investigation program designed to assure compliance with the Act and is authorized by section 8(a) of the Act.

3. This establishment has been inspected on at least two occasions by the Occupational Safety and Health Administration: on February 18, 1975, and on March 11, 1975. Each inspection

revealed numerous violations. The establishment violated the National Electrical Code by exposing employees to live wires, damaged electrical cables, and ungrounded equipment. It also violated standards governing personal protective equipment by failing to provide safety shoes. In total, the workplace was cited for 13 violations of the standards promulgated pursuant to the Occupational Safety and Health Act.

4. The Bureau of Labor Statistics has analyzed industrial injury rates and concluded that certificated carriers in the air transportation industry such as this establishment, have the seventeenth highest injury rate out of the ninety industries analyzed. The industry's prominent place on this list has caused the Occupational Safety and Health Administration to assign priority to inspection of establishments in this industry.

5. The inspection and investigation will be conducted by one or more compliance officers designated by the Secretary of Labor, to be his authorized representative(s), pursuant to proper and reasonable administrative standards contained in regulations duly issued by the Secretary under authorization granted in the Act and found in 29 CFR 1903.

6. The inspection and investigation will be conducted during regular working hours or at other reasonable times, within reasonable limits, and in a reasonable manner. The compliance officer(s) credentials will be presented to the employer, and the inspection and investigation will be commenced as soon as practicable after the issuance of this warrant and will be completed with reasonable promptness, in accordance with Section 3(a) of the Act.

7. The inspection and investigation will extend to the establishment or other area, workplace, or environment where work is performed by employees of the employer, and to all pertinent conditions, structures, machines, apparatus, devices,

equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether this employer is complying with the Occupational Safety and Health Standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

8. The compliance officer(s) are authorized by the Act and in 29 CFR 1903.5 regulation promulgated under section 8(a) of the Act to take photographs and samples, employ other reasonable investigative techniques, and to question privately any employer, owner, operator, agent, or employee of the establishment.

9. The compliance officer(s) may be accompanied by a representative of the employer and a representative authorized by his employees, pursuant to section 8(e) of the Act.

10. A return will be made to the court at the completion of the inspection and investigation.

11. Proper entry pursuant to section 8(a)(1) of the Act for the aforesaid purposes was attempted by a compliance officer on the 27th day of October 1976, but the right of entry was denied by the employer, or an agent of the employer.

12. The authority for issuance of the inspection warrant is section 3(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Regulations issued pursuant thereto in 29 CFR 1903.5. The inspection sought is not a search in traditional criminal law, Wyman v. James, 400 U.S.

309(1971) and Camara v. Municipal Court, 387 U.S. 523(1967);
See v. Seattle, 387 U.S. 541 (1967); and Colonnade Catering
Corp. v. United States, 397 U.S. 72 (1970).

Efraim Zolman
 Compliance Officer
 Occupational Safety & Health
 Administration
 U.S. Department of Labor
 136-21 Roosevelt Avenue
 Flushing, New York 11354

Sworn to before me, and subscribed
 in my presence this 25 day of
Oct, 1976

Joanne T. Tartaro
 NOTARY PUBLIC

JOANNE T. TARTARO
 Notary Public, State of New York
 No. 4623333
 Commission Expires March 30, 1978

VINCENT H. CATOGGIO

UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

IN THE MATTER OF:

ESTABLISHMENT INSPECTION OF:

NORTHWEST ORIENT AIRLINES, INC.

)
) Magistrate's Docket
) No. _____
)
) Case No. _____
)

WARRANT FOR INSPECTION UNDER THE OCCUPATIONAL
SAFETY AND HEALTH ACT OF 1970

TO: MR. EFRAIM ZOLDAN, AND ANY OTHER COMPLIANCE OFFICERS OF
THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED
STATES DEPARTMENT OF LABOR.

Sworn application having been made, reasonable
legislative and administrative standards having been prescribed,
and probable cause shown by Mr. Efraim Zoldan, compliance officer
of the Occupational Safety and Health Administration, United
States Department of Labor, for an inspection and investigation
of the workplace described as:

Northwest Orient Airlines, Inc.
Hangar Number 1
JRK International Airport
Jamaica, Queens County, New York

IT IS HEREBY ORDERED that based on the grounds set
forth in the sworn application for inspection warrant and
pursuant to section 8(a) of the Occupational Safety and
Health Act of 1970 (29 U.S.C. 651, et seq.) hereinafter
referred to as the Act, YOU, AND/OR ANY OTHER COMPLIANCE OFFICER(S),
OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED
STATES DEPARTMENT OF LABOR, ARE AUTHORIZED to enter the above
described premises during regular working hours or at other
reasonable times, and to inspect and investigate in a reasonable
manner and to a reasonable extent (including but not limited
to the taking of photographs and samples and to question
privately any employer, owner, operator, agent or employee
of the establishment), the workplace or environment where work is

Exhibit C

Annexed to Affidavit of Peter van Schaick
The decision of Administrative Law Judge
Jerome Ditore presented to United States
Magistrate Catoggio during Defendant's
motion to quash the Inspection Warrant.

performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injuries to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules and regulations, and orders issued pursuant to the Act.

A return shall be made to this court showing that the inspection has been completed, within ten (10) days of the issuance of this warrant.

DATED: October _____, 1976.

Nov 4, 1976

VINCENT A. CATOGGIO

UNITED STATES MAGISTRATE

RETURN

INSPECTION of the establishment premises described in
warrant was made on _____, 1976.

Compliance Officer
Occupational Safety & Health
Administration
136-21 Roosevelt Avenue
Flushing, New York 11354

Subscribed and sworn to and
returned before me this
day of _____, 1976.

NOTARY PUBLIC

UNITED STATES MAGISTRATE

Philip C. Sullivan
The decision of Administrative
Law Judge Jerome Ditore presented
to United States Magistrate Catoggio
during Defendant's motion to quash
the Inspection Warrant.

EXHIBIT C

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

NORTHWEST ORIENT AIRLINES, INC.,

Respondent.

OSHRC DOCKET

NO. 13649

Appearances:*

Francis V. LaRuffa, Regional Solicitor
United States Department of Labor
1515 Broadway, Room 3555
New York, New York 10036
Attorney for complainant
by Louis D. DeBernardo, Esq., of counsel

James A. Abbott, Esq.
Vice President Law, Northwest Orient Airlines, Inc.
Minneapolis St. Paul International Airport
St. Paul, Minnesota
Attorney for respondent

DECISION AND ORDER

DITORE, J.:

STATEMENT OF THE CASE

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, et seq., hereinafter called the Act), contesting a citation for a serious violation of section 5(a)(1) (29 U.S.C. § 654(a)(1)) of the Act, issued by complainant

*The International Association of Machinists and Aerospace Workers appeared as a party representing the union local and the affected employees. At the close of complainant's direct case the International withdrew as a party and ended its participation in the case (T. 1761-1765).

against respondent under the authority vested in the complainant by section 9(a) of the Act (29 U.S.C. § 658(a)).

The citation as amended alleges that as a result of an inspection conducted on April 24, 25 and 29, 1975, of a work-place located at Northwest Orient Airlines, Unit Terminal Building #54, JFK International Airport, Jamaica, New York, and described as "Aircraft Terminal", the respondent from November 1, 1974 to and including April 29, 1975, violated section 5(a)(1) (29 U.S.C. § 654(a)(1)) of the Act by failing to provide to its employees employment and a place of employment which was free from recognized hazards that were causing or were likely to cause death or serious physical harm.

Specifically, the amended citation charged respondent with the failure to provide adequate means to protect its ground maintenance employees when changing landing lights on its Boeing 747 aircraft, from the hazard of being crushed by the aircraft's electro-pneumatically controlled leading edge flaps (T. 7)*.

Pursuant to the enforcement procedures set forth in section 10(a) (29 U.S.C. § 659(a)) of the Act, the respondent was notified by letter dated May 21, 1975, from the Acting Area Director of the Queens, New York area, that the Occupational Safety and Health Administration proposed to assess a

*Reference key: T. refers to pages of transcript of hearing minutes.

\$700.00 penalty for the serious violation of section 5(a)(1) of the Act. The action was heard at New York, New York, and commenced on October 28, 1975.

I S S U E S

1. Whether respondent is exempt from the provisions of the Occupational Safety and Health Act of 1970 by reason of section 4(b)(1) of the Act.
2. If respondent is not exempt from the provisions of the Act, whether a serious violation of section 5(a)(1) of the Act existed at its workplace during the times alleged.
3. If a serious violation of section 5(a)(1) of the Act existed, whether respondent was responsible for the serious violation.
4. If respondent was responsible for the violation, whether, the penalty proposed is proper and reasonable.

\$700.00 penalty for the serious violation of section 5(a)(1) of the Act. The action was heard at New York, New York, and commenced on October 28, 1975.

I S S U E S

1. Whether respondent is exempt from the provisions of the Occupational Safety and Health Act of 1970 by reason of section 4(b)(1) of the Act.

2. If respondent is not exempt from the provisions of the Act, whether a serious violation of section 5(a)(1) of the Act existed at its workplace during the times alleged.

3. If a serious violation of section 5(a)(1) of the Act existed, whether respondent was responsible for the serious violation.

4. If respondent was responsible for the violation, whether, the penalty proposed is proper and reasonable.

STATEMENT OF THE EVIDENCE

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Respondent was charged with a violation of section 5(a)(1) (General Duty Clause) of the Occupational Safety and Health Act of 1970, in that it failed, from November 1, 1974 to and including April 29, 1975, at its John F. Kennedy International Airport workplace, to furnish its employees a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm. The underlying basis of the charge was respondent's failure to provide adequate means to protect its ground maintenance employees performing maintenance landing light work in the leading edge flap cavity of respondent's Boeing 747 aircraft, from the hazard of being crushed by the electro-pneumatically controlled leading edge flaps (citation; T. 7). The issue raised by the charge was tried on the merits.

A narration or statement of the evidence submitted in support of the charge by complainant and defended against by respondent is not set forth. The action is resolved on the basis of respondent's affirmative defense that it is exempt from the provisions of the Occupational Safety and Health Act of 1970 pursuant to section 4(b)(1) of the Act (29 U.S.C. § 653(b)(1)).

Section 4(b) (1) states in pertinent part that:

"[n]othing in this Chapter shall apply to working conditions of employees with respect to which Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."
(emphasis supplied)

In support of its exemption contention, respondent relies on the Federal Aviation Act of 1958 (49 U.S.C. § 1301 et seq).^{*} This Act authorizes and empowers the Federal Aviation Administration (hereinafter referred to as F.A.A.) "to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time" in the interests of safety, minimum standards relating to, among other matters, the design and performance of aircraft, the inspection servicing and overhaul of aircraft, aircraft engines, propellers, and appliances; the equipment and facilities for such inspection, servicing and overhaul; and the practices, methods or procedures, necessary to provide adequately for national security and safety in air commerce (49 U.S.C. § 1421).

Section 1425 of 40 U.S.C. mandates each air carrier to "make, or cause to be made such inspections, maintenance, overhaul and repair of all equipment used in air transportation as

^{*}This Act and the rules and regulations promulgated thereunder by the Federal Aviation Administration are judicially noticed (T. 3189).

may be required by [the Federal Aviation Act]", "or the orders rules and regulations of the [Federal Aviation] Administrator issued thereunder."

Pursuant to the authority granted the F.A.A. to issue rules and regulations, and pursuant to the duty imposed on air carriers concerning the maintenance of equipment in air transportation, the F.A.A. promulgated in the Federal Register on December 31, 1964, (29 F.R. 19186) and codified in 14 CFR §§ 43.13, 121.131, 121.133, 121.135 and 121.137 rules and regulations dealing with maintenance performance and "Manual Requirements".

Section 43.13 entitled "Performance Rules (general)" states in subpart (a):

"Each person maintaining or altering, or performing preventive maintenance, shall use methods, techniques, and practices acceptable to the Administrator. He shall use the tools, equipment and test apparatus necessary to assure completion of the work in accordance with accepted industry practices"

Section 121.131 entitled "Preparation" prescribes the requirements for preparing and maintaining manuals by all certificate holders [air carrier]. Section 121.133 states that each "domestic and flag air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in conducting its operations" and

permits the air carrier to prepare the manual in whole or in part, in printed form or microfilm.

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Section 121.135(a)(1) entitled "Contents" states, among other matters, that each manual required by section 121.133 must "[i]nclude instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety" (emphasis supplied). This section further permits the manual to be divided into two or more parts. Each part must contain the information appropriate for each specialized group of personnel. The appropriate information (24 different subject matters are listed), includes but is not limited to, "[i]nstructions and procedures for maintenance, preventive maintenance and servicing" (14 CFR § 121.135(b)(16)) and "other [not previously listed] information or instruction relating to safety" (14 CFR § 121.135(b)(24)).

Pursuant to 14 CFR §§ 43.13, 121.131, 121.133 and 121.135, respondent used methods, techniques and practices acceptable to the F.A.A., maintained the required manuals in printed and microfilm form for its maintenance personnel which contained the instructions and procedures as to the approved methods, techniques and practices necessary not only for changing landing lights on its 747 aircraft not equipped with access panels* but for performing this specific maintenance task or work in a safe manner (T. 3156, 3590; Exhs. C-21, C-22).

*The access panel was a modification in the wing of the 747 aircraft which allowed the changing of landing lights through this panel rather than through the leading edge flap cavity (T. 119; Exh. C-12).

Respondent's maintenance manual for its 747 aircraft was approved by the F.A.A. in that it was not disapproved (T. 3159-3160, 3174-3175, 3194, 3727). It consisted of over 20,000 pages and was distributed by respondent to its aircraft maintenance personnel in printed form and available to them in microfilm form (T. 3169, 3170; Exhs. R-85a to 85e).

Exhibits C-21 and C-22 are microfilm reproductions of that portion of respondent's maintenance manual which instructs and informs its maintenance personnel in the changing or relamping of landing lights on respondent's 747 aircraft through the leading edge Krueger flap area of the aircraft's wings, and prescribes and describes the lock-out procedure that must be followed by its maintenance personnel to deactivate the flaps activation system to ensure the safety of maintenance personnel when working in the flaps' danger area.

For the purposes of this decision it is not necessary to detail the procedure, including the required safety steps of this landing light operation. It is sufficient to state that complainant's expert witness, Edwin Pfaffman, Director of Engineering of 747 aircraft, for the Boeing Aircraft Company (T. 73), stated with absolute certainty that the circuit breaker lock-out safety procedure required by respondent, as well as other safety procedures required by other airlines, when changing landing lights on a 747 aircraft without an

access panel, eliminate any occupational hazard to a maintenance employee working in the leading edge flap cavity (T. 103, 146, 147).

The witnesses, Anthony Lecausi and William Huskins, Jr., gave similar testimony (T. 345, 3430).

Complainant does not refute the efficacy of the circuit breaker lock-out safety procedure and advocates it as one of two alternative means by which the hazard of changing landing lights through the leading edge cavity can be prevented or eliminated* (complainant's brief in opposition to respondent's motion to dismiss, pp. 11, 17).

OPINION

Section 4(b)(1) of the Occupational Safety and Health Act of 1970 states in pertinent part:

"Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

This section must be construed to effect a balance between the purpose of the Occupational Safety and Health Act of 1970,

*Complainant on the evidence submitted at the hearing attacked respondent's enforcement of the lock-out safety procedure and the failure to provide or make available the proper tools, i.e., safety locks, and pins, used in the procedure.

which is to assure as far as possible every working man and woman in the Nation safe and healthful working conditions and the purpose of section 4(b)(1) which is to avoid the confusion and duplication of effort between or among Federal agencies in imposing rules and regulations affecting the occupational safety and health of such workers. Southern Railroad Company v. OSHRC and Secretary of Labor, Docket No. 75-1055, 4th Cir., decided February 9, 1976.

To effectuate this balance the Commission supports the principle that the Occupational Safety and Health Administration cannot enforce its regulations covering specific working conditions where another Federal agency has exercised its statutory authority over the same conditions. Secretary of Labor v. Mushroom Transportation Co., Inc., 5 OSAHRC 64 (1973), (1973-1974) OSHD ¶6,881; Secretary of Labor v. Texas Eastern Transmission Corp., Docket Nos. 4091, 4078, 1975-1976, CCH OSHD ¶20,092. Accord: Southern Railway Company v. OSHRC and Secretary of Labor, supra.

The Federal Aviation Administrator pursuant to the Federal Aviation Act of 1958, is given broad powers and authority to prescribe rules and regulations relating to safety in the air transportation field (49 U.S.C. §§ 1421, 1423, 1424). Complainant does not disagree but contends that the policy and extent of the Federal Aviation Act of 1958,

as evidenced by the sections of the United States Code cited above, is directed principally to safety in flight for the protection of public passengers and aircraft crews, and is not specifically directed to the occupational safety of aircraft ground maintenance crews (complainant's brief pp. 3-4). In short, the Federal Aviation Administrator's exercise of authority affecting the safe working conditions of ground maintenance personnel is only incidental to the Administrator's major concern of aircraft flight safety (complainant's brief p. 4). Therefore complainant reasons, citing Secretary of Labor v. Fineberg Packing Co., OSHRC Docket No. 61 (1974), 1973-1974 OSHD ¶17,518, the Administrator lacked the authority to prescribe occupational safety and health regulations for ground maintenance personnel engaged in the maintenance and servicing of commercial aircraft.

Respondent's contention misses the mark. Congress did enact the Federal Aviation Act to induce safety in air transportation with specific concern for the safety and protection of passengers, aircraft crews and persons on the ground from aircraft mishaps but it does not follow that the broad latitude given the F.A.A. in matters of safety is limited only to safety considerations of the airworthiness of aircraft in flight. The authority conferred on the F.A.A. in matters of safety encompasses and includes not only the work of ground maintenance crews as it relates to the airworthiness of

aircraft, but includes the safe working conditions of the ground crews when performing aircraft maintenance work (40 U.S.C. § 1421). Secretary of Labor v. Finebar Packing Co., supra is inapposite. The Federal Aviation Act of 1958 in matters of safety embraces, among others, ground maintenance personnel.

Further, the Federal Aviation Act of 1958, places the duty on each air carrier to make, or cause to be made, such inspections, maintenance, overhaul and repair of all equipment used in air transportation as may be required by the Act, or the orders, rules and regulations of the Federal Aviation Administrator issued thereunder (49 U.S.C. § 1425).

The question remains whether the F.A.A. exercised its broad authority under the Federal Aviation Act of 1958 to prescribe regulations for the safe working conditions of aircraft ground maintenance personnel. The Act, the regulations issued pursuant thereto by the F.A.A., and the evidence adduced at the hearing on this issue require an affirmative answer.

Pursuant to the Federal Aviation Act of 1958 and the powers granted by the Act, the Administrator exercised his authority thereunder by issuing and promulgating regulations which required each air carrier "maintaining or altering or performing preventive maintenance" to "use methods, techniques and practices acceptable to the Administrator", and to "use the tools equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices"

(14 CFR § 43.3); and regulations which not only required each air carrier to prepare and maintain manuals but required the inclusion therein of instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a "high degree of safety" (14 CFR §§ 121.131, 121.133, 121.135(a)(1), 121.135(b) and 121.135(16) and (24)).

Complainant does not dispute the above exercise of authority but contends it is not a sufficient exercise of authority by the F.A.A. because neither the Federal Aviation Act of 1958 nor the regulations of the F.A.A. are specifically directed to the safe working conditions of ground maintenance personnel. This contention is based on the further contention that the F.A.A. abdicated its responsibility over safety and health by delegating such responsibility to each air carrier through the manual requirement regulations (14 CFR §§ 121.131, 121.133, 121.135) (complainant's brief pp. 7, 8). Inherent in complainant's contentions is the admission that the F.A.A. has authority over the occupational safety and health of ground maintenance personnel, but has not exercised that authority properly.

Congress empowered the F.A.A. to implement the policy and purpose of the Federal Aviation Act of 1958 by promulgating rules and regulations in the field of safety in air transportation. Complainant may not approve of the form and

content of the regulations relating to, or affecting, the safety of ground maintenance personnel but the regulations are a valid exercise of authority by the F.A.A. and complainant cannot substitute his wisdom for that of the F.A.A.. There is no evidence, and complainant has offered none, which establishes that the "manual requirement" regulations of the F.A.A. are not a valid exercise of statutory authority to prescribe requirements affecting the occupational safety and health of ground maintenance personnel. Nor is there anything in section 4(b)(1) of the Occupational Safety and Health Act of 1970, which prescribes or mandates the manner in which another Federal agency must exercise its statutory authority as to regulations affecting occupational health and safety. It is sufficient that the authority exists and is exercised.

Matters relating to the size of the manuals, to the approved revisions that can be made to the manuals, to the various approved methods that must be followed which provide occupational safety to the work of ground maintenance personnel changing landing lights on 747 aircraft, or the manner of enforcement by the F.A.A. are all irrelevant to the issue of whether the F.A.A. ~~has exercised its statutory authority to~~ prescribe requirements for the occupational safety of ground maintenance personnel. See Secretary of Labor v.

Mushroom Transportation Co., Inc., OSHRC 5 OSAHRC 64 (1973),
1973-1974 OSHD ¶16,881; Secretary of Labor v. American Airlines,
OSHRC Docket No. 9392 (1975), 1975-1976 OSHD ¶20,129.

Nor is there any merit to complainant's contention that occupational safety rules prescribed by F.A.A. regulations through the use of manuals violates the Administrative Procedure Act (5 U.S.C. § 553). The short answer is that the regulations of the F.A.A. set forth herein were properly promulgated and were subject to public participation. Complainant has not established the contrary. Nor is there any evidence that any air carrier, including respondent, is free to disregard any safety instructions set forth in its F.A.A. approved and prescribed manuals.

The evidence establishes that the F.A.A. pursuant to the authority granted by statute, requires manuals to be prepared and maintained by each air carrier and approved by the F.A.A. These manuals incorporate safety procedures that must be followed by ground maintenance personnel in performing their maintenance and repair work on Boeing 747 aircraft including the changing of landing lights on Boeing 747 aircraft not equipped with an access panel.

Respondent maintains such a manual for its ground maintenance employees which requires the use of a circuit breaker, lock-out procedure, and other redundant procedures, to completely deactivate the leading edge flaps of a Boeing 747 when work is performed in that area including the changing of landing lights. Respondent does not refute or deny that respondent maintains the manual prescribed and required by

the F.A.A. or that the manual prescribes and requires the occupational safety lock-out procedure. Complainant advocates the very safety procedure found in respondent's manual - lock-out of circuit breakers - to comply with section 5(a)(1) of its Act (complainant's brief pp. 11, 17).

The evidence on this issue including the Federal Aviation Act of 1958 and the regulations promulgated thereunder establish that the Federal Aviation Administrator possessed the statutory authority which he exercised, to regulate the occupational safety of respondent's ground maintenance personnel changing landing lights on respondent's Boeing 747 aircraft not equipped with access panels.

Respondent is exempt from complying with section 5(a)(1) of the Occupational Safety and Health Act of 1970. Respondent's motion to dismiss the complaint and vacate the citation issued against it by reason of its exemption under section 4(b)(1) of the Act, is granted.

FINDINGS OF FACT

The credible evidence of record, the statutory law, and the regulations of the Federal Aviation Administration issued and promulgated thereunder establish preponderant proof of the following specific findings of fact.

1. Congress authorized and empowered the Federal Aviation Administration pursuant to the Federal Aviation Act of 1958, to promote and achieve safety in the field of air commerce by rule and regulation.

2. The authority granted to the Federal Aviation Administration in matters of safety is broad and includes safe working conditions affecting the occupational safety and health of ground personnel performing landing light maintenance work on an air carrier's Boeing 747 aircraft.

3. The Federal Aviation Administration through its Administrator, exercised its statutory authority by issuing and promulgating regulations affecting the occupational safety and health of ground maintenance personnel changing landing lights through the leading edge flap cavities of Boeing 747 aircraft.

4. The regulations of the Federal Aviation Administration require each air carrier performing maintenance work on its aircraft including Boeing 747 aircraft to use methods, techniques and practices acceptable to the Administrator and in accordance with accepted industry practices.

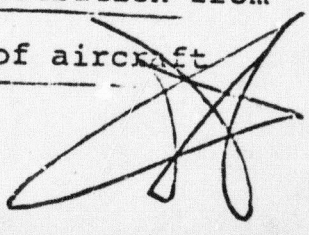
5. The regulations of the Federal Aviation Administration also mandate each air carrier to maintain a maintenance manual which must include all instructions and information necessary for its ground maintenance crews to perform their duties and responsibilities with a high degree of safety.

6. Respondent maintains the required maintenance manual pursuant to the regulations and approval of the Federal Aviation Administration. Specifically respondent's maintenance manual contains and sets forth the necessary maintenance information and prescribed safety procedures which its ground maintenance personnel are required to follow when changing landing lights through the leading edge flap cavities of its Boeing 747 aircraft.

7. Respondent's prescribed and F.A.A. approved safety procedure for the changing of landing lights on its Boeing 747 aircraft, is a circuit breaker lock-out procedure. This safety procedure eliminates the hazard of a maintenance employee when changing landing lights, from being crushed or seriously injured by the leading edge flaps of a Boeing 747 aircraft.

8. Complainant advocates the identical safety procedure as one of two alternate means of protection against the hazard, and as a means of compliance with section 5(a)(1) of the Occupational Safety and Health Act of 1970.

9. The exercise of authority by the Federal Aviation Administration in prescribing regulations affecting the occupational safety and health of respondent's ground maintenance personnel changing landing lights through the leading edge flap cavities of respondent's Boeing 747 aircraft, precludes the Occupational Safety and Health Administration from imposing its regulations in this specific area of aircraft maintenance work.



CONCLUSIONS OF LAW

1. Respondent is, and at all times material herein was, engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 652(5)).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter of respondent's affirmative section 4(b)(1) defense.

3. The Federal Aviation Administration exercised its authority to prescribe regulations affecting the occupational safety and health of respondent's ground maintenance personnel when changing landing lights through the leading edge flap cavities of respondent's Boeing 747 aircraft.

4. The Occupational Safety and Health Administration pursuant to section 4(b)(1) of the Occupational Safety and Health Act of 1970 is precluded from exercising its jurisdiction in the specific landing light working area of respondent's Boeing 747 aircraft.

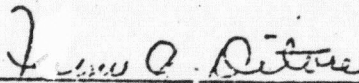
5. Respondent is exempt pursuant to section 4(b)(1) of the Occupational Safety and Health Act of 1970, from complying with the provisions of section 5(a)(1) of that Act.

O R D E R

Due deliberation having been had on the whole record,
it is hereby

ORDERED that respondent's motion to dismiss the action
herein pursuant to section 4(b)(1) of the Occupational Safety
and Health Act of 1970, is granted, it is further

ORDERED that the complaint herein is dismissed and the
citation and notification of proposed penalty are vacated.



JEROME C. DITORE
JUDGE, OSHRC

Dated: September 28, 1976
New York, New York

Exhibit D

Annexed to Affidavit of Peter van Schaick
United States Magistrate Catoggio's written
indication the the Inspection Warrant be
quashed.

309 (1971) and Camara v. Municipal Court, 387 U.S. 523 (1967);
See v. Seattle, 387 U.S. 541 (1967); and Coleman v. Columbia
Corp. v. United States, 397 U.S. 72 (1970).

11/5/76 Conference

Theodore Gotsch
 Atty. Gen. Helman
 Ernest Kilian
 Van Schaich

James Kofale }
 Douglas P. Catalano } Reavis
 + McGee

11/5/76 Search Warrant

anted - in view of FAA

preempting at least part of the
 area as indicated to me today
 for the first time as for decision
 of Administrative Judge Stone
 Sept 28, 1976 -

Wm. C. Catalano

Affidavit of William E. Huskins, Jr., dated
December 17, 1976 in Opposition to Plaintiff's
Motion to Reinstate Inspection Warrant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
W. J. USERY, JR., Secretary of Labor, :
United States Department of Labor, : 76 Civ. 2177
 : (ERN)
Plaintiff, :
 :
against : AFFIDAVIT IN
 : OPPOSITION
NORTHWEST ORIENT AIRLINES, INC., :
 :
Defendant. :
-----X

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

WILLIAM E. HUSKINS, JR., being duly sworn, deposes and
says:

1. I am a vice president of Northwest Airlines,
Inc. (incorrectly named herein as Northwest Orient Airlines,
Inc.) ("Northwest"), in charge of maintenance and engineering
and submit this affidavit in opposition to plaintiff's
motion for an order: (1) directing United States Magistrate
Vincent Catoggio to reinstate an inspection warrant previously
vacated by him; or (2) directing Northwest to permit an
inspection of Hangar 1, J.F.K. International Airport, which
is a worksite of Northwest's maintenance and cargo handling
personnel. I have personal knowledge of the facts hereinafter
set forth.

Plaintiff is Not Entitled to
the Relief Sought Herein

2. As shall be demonstrated, the instant application is an attempt to circumvent a decision and order of the Occupational Safety and Health Review Commission, dated September 28, 1976 (Mov. Aff. Exh. "C"), which determined that Northwest is not subject to the provisions of the Occupational Safety and Health Act of 1970 (the "Act"). That decision was predicated upon the fact that Northwest is subject to standards and regulations affecting occupational safety and health for ground maintenance personnel promulgated by the Federal Aviation Administration ("FAA") pursuant to the Federal Aviation Act of 1958.

3. Plaintiff failed to apprise Magistrate Vincent Catoggio of that order when he applied for the search warrant at issue herein on November 4, 1976. Upon being apprised of that order by Northwest's counsel on November 5, 1976, Magistrate Catoggio vacated the warrant, and held:

Search warrant vacated in view of FAA preempting at least part of the area as indicated to me today for the first time as per decision of Administrative Judge Ditore September 28, 1976. (Exh. "1" annexed hereto).

4. To create an aura of urgency for the drastic, unwarranted, relief presently sought, plaintiff suggests that the safety and health of Northwest's ground maintenance personnel are somehow endangered, despite the existence of stringent, pervasive FAA regulations that plaintiff does not claim have been violated. Indeed, plaintiff has submitted the affidavit of its attorney who

alleges "on information and belief" that two inspections of the premises were made on February 18, 1975 and March 11, 1975 which revealed 13 violations (Mov. Aff. ¶3). Plaintiff's counsel claims that the violations exposed the employees to "live wires, damaged electrical cables and ungrounded equipment", which would appear to be serious safety hazards. Significantly, however, plaintiff omits any reference to the provisions of the citations wherein all of the alleged violations are specifically characterized as "non-serious". In particular, paragraph 6 of each Citation (Mov. Aff., Exh. "A") provides as follows:

TYPE OF ALLEGED VIOLATION(S): Non-serious.

Plaintiff does not claim that any of these violations still exist nor does he claim that any other violations presently exist.

5. Lastly, plaintiff alleges that he has established a priority concerning inspections in the air transportation industry due to that industry's alleged high injury rate (Mov. Aff., ¶4), yet he does not claim that Northwest is typical of the industry. Indeed, Administrative Judge Ditore specifically ordered, on November 7, 1975, that the plaintiff could not inspect Northwest pending a continuance during which plaintiff and the FAA were to resolve the jurisdictional question. Judge Ditore thereby indicated his lack of concern as to the existence of any serious threat to the safety of Northwest's personnel during that continuance, which lasted for 70 days. That 70 day period expired in January 1976. The plaintiff did not attempt to inspect Northwest's facilities at J.F.K. thereafter until October 27, 1976. Moreover, plaintiff does not explain why

he waited almost one month after Magistrate Catoggio revoked the inspection warrant to make the instant application.

Plaintiff's inaction adequately demonstrates a lack of urgency concerning his desire to invade Northwest's premises.

Background

6. Northwest is subject to stringent federal regulation by the FAA. Pursuant to the authority vested in it by the Federal Aviation Act of 1958, the FAA is charged with promoting safety by prescribing regulations relating to the safe operation, inspection, servicing and overhaul of aircraft and any facilities, procedures or equipment relating thereto, including the working conditions of Northwest's personnel.

7. The FAA has assigned 14 full time inspectors to monitor Northwest's operations. Those FAA inspectors are on Northwest's premises almost daily. Eight of those inspectors monitor flight operations. The remaining 6 inspectors investigate, review and inspect work which is being performed both in and around the aircraft and hangars. Two of those 6 inspectors monitor radio and electrical equipment and maintenance thereon. Such inspections include examining not only the equipment aboard the aircraft and the manner in which maintenance is performed thereon, but also include examining the tools which are utilized in the maintenance process. Those tools are primarily stored in the hangar.

8. The maintenance inspectors examine work which is performed on the airframe of the aircraft and the aircraft's

power plant (i.e. engines), the equipment which is utilized in connection therewith and the working conditions of the personnel performing that work. That examination necessarily includes the observation of that equipment, the manner in which it is used, the safety procedures in connection therewith. Such work is performed not only on the aircraft but in the hangar.

9. In addition, at J.F.K. Airport the FAA maintains a staff of 20 full-time inspectors who are concerned with the manner in which maintenance is performed at all U.S. airlines. Should the inspectors assigned to Northwest desire immediate information and/or an inspection of Northwest's facilities at J.F.K., they either conduct the inspections themselves or request assistance from the FAA staff at J.F.K. All the FAA inspectors have free access to all of Northwest's facilities at any time. In fact, it is not uncommon for FAA inspectors to make unannounced visits to the premises or to be on the premises without the knowledge of Northwest's intermediate management personnel. Such inspectors are found at every major airport in the U.S. where Northwest conducts its operations.

10. In addition, pursuant to its statutory authority, the FAA has approved extensive rules and regulations promulgated by Northwest concerning the use of maintenance and cargo equipment, and the safety of Northwest's personnel in connection therewith. Those rules and regulations are contained in general maintenance and/or cargo manuals and specific airplane type maintenance manuals for all aircraft

types* operated by Northwest. The latter manuals are contained in 14 cassettes of microfilm which, when reproduced, consist of over 60,000 pages. The microfilm is available at all airports where Northwest personnel perform maintenance work. The manuals govern every aspect of maintenance of equipment, job performance, and maintenance procedures, and are replete with warnings concerning the use of equipment and the procedures to be followed so that the safety and health of Northwest's personnel will not be endangered. The General Maintenance Manual Volume A is approximately 2,500 pages and covers all maintenance functions not contained in other manuals. The maintenance manuals were approved by the FAA when first prepared. Each revision is submitted and approved by the FAA as the manuals are constantly updated to reflect the experiences of the air transportation industry. The manuals set forth not only remedial safety procedures, but more importantly set forth accident preventive measures.

11. The General Maintenance Manual Volume A contains descriptions of a personnel safety program and detailed procedures which are to be followed to avoid occupational accidents or injuries. For example,** the manual provides detailed instructions as to the use of the following equipment and/or procedures:

* Northwest utilizes the following aircraft: the Boeing models 707, 727 and 747, and the McDonnell Douglas model DC-10.

** The Manual covers many more areas than the examples given.

- A. Refueling/defueling (Exhibit "2" annexed hereto).
- B. Portable ground power equipment (Exhibit "3" annexed hereto).
- C. Cable inspection and replacement (Exhibit "4" annexed hereto).
- D. Oxygen cylinders (Exhibit "5" annexed hereto).
- E. Dry ice handling (Exhibit "6" annexed hereto).
- F. Aircraft noise (Exhibit "7" annexed hereto).
- G. Pushing and towing of aircraft (Exhibit "8" annexed hereto).
- H. Shipment of radioactive materials (Exhibit "9" annexed hereto).
- I. Protection from harmful materials (Exhibit "10" annexed hereto).
- J. Fire prevention (Exhibit "11" annexed hereto).
- K. Erection of scaffolding (Exhibit "12" annexed hereto.)
- L. Hangar floor cleaning (Exhibit "13" annexed hereto).

12. In addition, the General Maintenance Manual Volume A contains guidelines for a "Safety Data Dissemination-Safety Bulletin Program" which has been scrutinized by the FAA. Pursuant to that program, safety bulletins on maintenance and other operations are disseminated at regular intervals to Northwest personnel. The safety bulletins are available to the

FAA for its review. Moreover, the Manual provides for safety meetings that are regularly held between Northwest management and its employees. In particular, at JFK, there is a monthly meeting of a standing safety committee that is comprised of three members of management and three members of the International Association of Machinists and Aerospace Workers representing mechanics and servicing employees. At these meetings, the committee members discuss preventive training, and measures, and any safety problems or hazards uncovered at Northwest's premises or in its operations. Similar meetings are conducted at other airports from which Northwest operates. Annexed hereto as Exhibit "14" are copies of such meeting subjects that were disseminated in 1976.

13. With respect to cargo handling,* Northwest has similarly adopted procedures for training, examining and monitoring its employees in the basic rules of safety for such operations. These procedures are detailed in the Stations portion of Northwest's Stations & Sales Manual Volume A and in its Cargo Manual. These procedures are broader than the cargo handling procedures enacted by the FAA in the Federal Air Regulations. Northwest's manuals contain detailed instructions as to the use and procedures to be followed in cargo handling to avoid occupational injuries. An example of some of the areas covered is as follows:

* Cargo handling occurs inside and outside of Hangar No. 1 at JFK International Airport.

- a. Ramp Safety Procedures (Exhibit "15" annexed hereto).
- b. Load Control (Exhibit "16" annexed hereto).
- c. Operational Control (Exhibit "17" annexed hereto).
- d. Preparation of Weight Distribution (Exhibit "18" annexed hereto).
- e. Transportation of Animals and Perishable Shipments (Exhibit "19" annexed hereto).
- f. Weight and Balance Training (Exhibit "20" annexed hereto).
- g. Acceptable and Non-Acceptable Shipments, including descriptions as to handling of dangerous cargo (Exhibit "21" annexed hereto).
- h. Cargo Loading Precautions (Exhibit "22" annexed hereto).

14. In addition, a substantial number of Northwest's maintenance personnel are licensed by the FAA, but only after they have received extensive training in the proper and safe maintenance procedures and in the use of maintenance equipment, and have passed extensive FAA examinations. Such training is a condition precedent to the issuance of the license by the FAA.

15. In particular, maintenance personnel possessing an airframe license must have passed an FAA examination which consists of both a written and practical

examination. The written portion of the test lasts approximately two to three hours. The practical portion of the test, which lasts approximately 8 hours, consists of the examinee making actual repairs on the aircraft body by utilizing parts, tools and equipment which are typical of that used at the airlines in performing this work.

15(a). Airframe licensees repair the structure of the aircraft or its internal systems (exclusive of the engines). These employees use equipment which is stored inside the maintenance hangar and which consists of specialized tools such as slings, measuring devices, accident prevention tools, and leading edge activation safeguards. In addition to utilizing the specialized tools, such employees also use other equipment in the hangar consisting of workstands, fluids, spare parts, drills, volt-ohmmeters, instrument calibration equipment, radio and navigation equipment, test equipment, and mechanized tools, such as tractors, lavatory servicing equipment, water servicing equipment, de-icing equipment, and strut servicing equipment. Northwest's manuals set forth specific instructions and warnings as to the manner in which the equipment is to be safely utilized so as to prevent occupational injuries.

16. Other maintenance personnel possess powerplant (aircraft engine) licenses which are also obtained after an extensive FAA examination. These individuals work on the aircraft engines and use parts, tools and equipment comparable to those specified above for the airframe licensees.

17. A third category of Northwest employees who operate in or about the hangar consists of radio electrical mechanics. Such mechanics are required to possess a license from the Federal Communications Commission which necessitates an understanding of electrical circuits and repair work incidental thereto. In addition, they must undergo special training by the airline on instrumentation, radio and navigation equipment. The equipment they use includes volt-ohmmeters, oscilloscopes and radio test equipment. Northwest's manuals also contain detailed procedures to be followed for the maintenance and use of such equipment so as to avoid occupational accidents.

18. In addition to the foregoing, the remainder of the personnel working in the hangar consist of plant maintenance mechanics who perform maintenance and repair work on the numerous items of tools and equipment which are found in the maintenance hangars. Such equipment includes tractors, trailers, welding tools, and other equipment similar to that one would expect to find in a large automotive repair shop. That equipment and the use thereof, is also inspected by the FAA. The procedures to be followed in using such equipment, and in making repairs thereon, are set forth in manuals provided by the equipment's manufacturer, which contain warnings as to the procedures to be followed in connection with the use and operation thereof.

19. In addition, the Stations portion of Northwest's Stations & Sales Manual Volume A, contains detailed procedures to be followed for the use of motorized equipment. Those procedures have been approved by the FAA and provide that before operating such motorized equipment a person must receive training and examination on each item of motorized equipment he will be called upon to use. That examination requires "that the employee "demonstrate his ability to operate the equipment in a safe and satisfactory manner" (Exhibit "23" annexed hereto). The above equipment and training applies to all Northwest maintenance, cargo handling and servicing personnel.

20. Notwithstanding the broad FAA authority to regulate the safety standards relating to Northwest's employees and their worksite, plaintiff notified Northwest, by letter dated May 21, 1975, that the Occupational Safety and Health Administration ("OSHA") proposed to assess a penalty for a violation of Section 5(a)(1) of the Act because an inspection of one of Northwest's maintenance facilities at J.F.K. Airport allegedly revealed that adequate means were not provided to protect its ground maintenance employees from the hazard of being crushed by electro-pneumatically controlled leading edge flaps while performing maintenance operations on the Boeing 747 aircraft. (Mov. Aff., Exh. "C", p. 4).

21. Northwest contested the alleged violation before the Occupational Safety and Health Review Commission ("OSHARC"), and moved to dismiss the proceedings on the ground that it

was exempt from the Act. The Administrative action before the Occupational Safety and Health Review Commission was assigned to Administrative Law Judge Jerome C. Ditore, who conducted 24 days of hearings in which testimony as to the violations, the FAA regulations, and Northwest's rules and regulations, was adduced.

22. During the hearings, Judge Ditore directed a 70 day recess wherein the Secretary was to contact the Department of Transportation in an effort to resolve each agency's respective jurisdiction. The Secretary did not comply with this request and the trial continued.

23. On September 28, 1976 Judge Ditore rendered a decision sustaining Northwest's position as to jurisdiction and dismissed the Secretary's complaint. In so holding, Judge Ditore specifically ruled that the Occupational Safety and Health Administration did not possess subject matter jurisdiction to prescribe standards and regulations affecting Northwest's ground maintenance personnel. A copy of Judge Ditore's decision is annexed to the moving papers as Exhibit "C".

24. Plaintiff now argues, however, that Judge Ditore's decision is not applicable herein since it was limited to the specific working condition (i.e. installation of access panels on the wings of Northwest B747 aircraft) before him for adjudication. An examination of the record before the Administrative tribunal indicates otherwise.

25. Annexed hereto as Exhibit "24" is a copy of Northwest's motion for an order dismissing the administrative proceeding on

the grounds * * * that the statutory authority granted to and exercised by the Federal Aviation Administration precludes OSHA subject matter jurisdiction * * *.

26. That Administrative Judge Ditore specifically ruled upon this broad jurisdictional question is evidenced by specific findings in his decision (Exh. "C" to Mov. Aff.), and plaintiff's Petition for Discretionary Review therefrom, a copy of which is annexed hereto as Exhibit "25".

27. In his decision and order, Administrative Judge Ditore posed the issue framed by the parties as follows.

1. Whether respondent [Northwest] is exempt from the provisions of the Occupational Safety and Health Act of 1970 by reason of Section 4(b) of the Act.

In addition, he stated that:

The action is resolved on the basis of respondent's [Northwest's] affirmative defense that it is exempt from the provisions of the [Act].

28. In finding that Northwest was exempt from the provisions of the Act, Judge Ditore held as follows:

Congress did enact the Federal Aviation Act to induce air safety in air transportation with specific concern for the safety and protection of passengers, aircraft crews and persons on the ground from aircraft mishaps but it does not follow that the broad latitude given the FAA

in matters of safety is limited only to safety considerations of the airworthiness of aircraft in flight. The authority conferred on the F.A.A. in matters of safety encompasses and includes not only the work of ground maintenance crews as it relates to the airworthiness of aircraft, but includes the safe working conditions of the ground crews when performing aircraft maintenance work. (40 U.S.C. §1421). (emphasis added)

29. Moreover, Judge Ditore held that the FAA was not only imbued with the authority to regulate the safe working conditions of maintenance personnel, but that such authority was indeed exercised by the FAA. In this regard, Judge Ditore further held that:

The question remains whether the F.A.A. exercised its broad authority under the Federal Aviation Act of 1958 to prescribe regulations for the safe working conditions of aircraft ground maintenance personnel. The Act, the regulations issued pursuant thereto by the F.A.A., and the evidence adduced at the hearing on this issue require an affirmative answer.

30. Indeed, Judge Ditore specifically made the following Conclusion of Law:

5. Respondent is exempt pursuant to section 4(b)(1) of the Occupational Safety & Health Act of 1970, from complying with the provisions of section 5(a)(1) of that Act.

31. In seeking review before the Occupational Safety and Health Review Commission of Judge Ditore's order, plaintiff recognized that the order provided for a broad exemption from the Act for Northwest, and that it was not

merely limited to the cited violation. In particular, plaintiff made the following exception to Judge Ditore's order (Exh. "25" annexed hereto):

1. Complainant takes exception to the judge's holding on pages 11 and 12 [quoted at ¶¶ 28 and 29, above] that the exercise of statutory authority by the Federal Aviation Administration (FAA) provides safety and health protection to ground maintenance personnel which is more than incidental.

for which plaintiff proffered the following reason (Exh. "25" annexed hereto, p. 2):

1. It is the Secretary's (plaintiff's) position that FAA's statutory authority to promulgate safety regulations is primarily directed toward the safety of aircraft while in the air * * *, that nowhere in its enabling legislation is FAA directed to promote safety of ground crews and that to the extent the FAA's exercise of authority does affect the safe working conditions of ground crew it must be considered auxillary and indeed incidental to FAA's primary concern with safety in flight.

32. In October, 1976 OSHARC agreed to review Judge Ditore's decision and order. OSHARC Commissioner Timothy F. Cleary, in agreeing to that review stated:

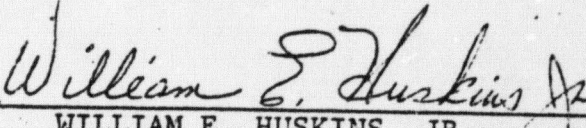
The issues raised by the petition, a copy of which is attached, include:

Whether the Administrative Law Judge erred in concluding that pursuant to section 4(b)(1) of the Act Respondent [Northwest] is exempt from complying with the provisions of section 5(a)(1) of the Act.

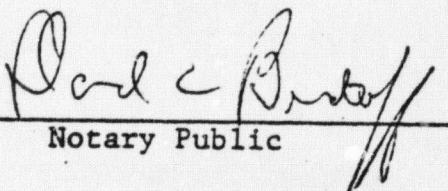
(A copy of Commissioner Cleary's Direction For Review is annexed hereto as Exhibit "26").

33. While the Secretary's petition for a review of Judge Ditore's decision contests his conclusions, it is clear that he found that the FAA regulates virtually all of Northwest's operations. Northwest is complying with the stringent safety standards established by the FAA. Northwest does provide a safe workplace for its employees.

WHEREFORE, it is respectfully requested that plaintiff's application be denied in all respects.


WILLIAM E. HUSKINS, JR.

Sworn to before me this
17th day of December, 1976.


Notary Public

DAVID C. BIRDOFF
Notary Public, State of New York
No. 30-5323315
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1978

Affidavit of James A. Abbott dated
December 20, 1976 in Opposition to
Plaintiff's Motion to Reinstate
Inspection Warrant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 76

-----X

W. J. USERY, JR., Secretary of Labor, : 76 Civ. 2177
United States Department of Labor, : (ERN)

Plaintiff, :

-against- :

AFFIDAVIT

NORTHWEST ORIENT AIRLINES, INC., :

Defendant. :

-----X

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

JAMES A. ABBOTT, being duly sworn, deposes and says:

1. I am Vice President - Law of Northwest Airlines, Inc. ("Northwest"), a Minnesota corporation. Northwest holds certificates of public convenience and necessity issued by the Civil Aeronautics Board pursuant to the Federal Aviation Act of 1958 (49 U.S.C. §1301 et seq.) to provide scheduled and charter air transportation services within the United States and between the United States and points in Asia.

2. I appeared as counsel for Northwest before OSHA Administrative Law Judge Jerome Ditore in the matter demoninated Secretary of Labor v. Northwest Airlines, Inc., Docket. 13649. Docket 13649 involved a complaint in which it was alleged by the Occupational Safety and Health Administration ("OSHA") that Northwest was in violation of the Occupational

Safety & Health Act of 1970 (the "Act") at its facilities located at John F. Kennedy International Airport. The nature of the dispute is more fully set forth in the decision of Judge Ditore, a copy of which is annexed to the moving affidavit as Exhibit "C".

3. The hearing on Docket 13649 commenced on October 28, 1975 in New York. At the outset, I moved for a dismissal on the basis that the Occupational Health & Safety Review Commission (the "OSHARC") lacked subject matter jurisdiction because Northwest was exempt from the Act, pursuant to Section 4(b)(1), because it was subject to the jurisdiction of another federal agency, the Federal Aviation Administration (the "FAA"). Judge Ditore took this motion under advisement. The Judge further advised that it was the policy of OSHARC to treat a contest of subject matter jurisdiction under Section 4(b)(1) of the Act as an affirmative defense. I noted my objection and the Judge thereafter directed the parties to proceed on the merits of the complaint.

4. The hearing proceeded for approximately 10 days. It was then adjourned at the request of the Secretary of Labor to permit a discussion in the Judge's chambers regarding the testimony of one of the Secretary's witnesses.

5. When the hearing reconvened the Regional Solicitor for OSHA moved the Court to dismiss the matter without prejudice. When this motion was denied, the Regional Solicitor moved the Court to dismiss the matter with prejudice. Northwest objected and this motion was also denied.

6. The reason I objected to a dismissal either with or without prejudice was that Northwest required a determination as to whether OSHA or FAA had jurisdiction over the occupational health and safety of its employees to avoid conflicting regulation by both agencies.

7. The Regional Solicitor then moved the court to permit the Department of Labor, through OSHA, and the Department of Transportation, through FAA, to meet and confer on the question of whether OSHA or the FAA had jurisdiction over the occupational safety and health of employees of Northwest. I advised the Court that prior to commencement of the hearing before Judge Ditore I had suggested to counsel for OSHA that the case be continued for a period of ninety days to permit OSHA and the FAA to resolve the question of which agency had jurisdiction over the occupational safety and health of Northwest's employees. The suggestion was rejected by OSHA's counsel. I protested to the Court that a delay in the decision of the Court would be prejudicial to my client because during the delay Northwest would be exposed to repeated inspections and investigations by OSHA. Despite my objection to a continuance, the court granted the motion

of the Regional Solicitor and continued the hearing until January 15, 1976 to permit OSHA and the FAA to consider the question of which federal agency had jurisdiction over the occupational health and safety of Northwest personnel.

8. The Court, however, directed OSHA not to inspect Northwest during the continuance leaving FAA as the sole agency to regulate Northwest.

9. On January 15, 1976 the hearing reconvened. It immediately became clear that OSHA had made no attempt to confer with the Department of Transportation or the FAA during the continuance. There was, therefore, no resolution of the jurisdictional question by agreement between the two federal agencies.

10. The hearing therefore recommenced and proceeded until February 4, 1976 when it was concluded. In all, the hearing encompassed twenty-four trial days. The transcript consists of 3,904 pages. The record includes over 150 exhibits.

11. The case ultimately was disposed of by granting Northwest's motion to dismiss for lack of subject matter jurisdiction. The judge held that Northwest was exempt from Section 5(a)(1) of the Act (29 U.S.C. §654(a)(b)) by reason of Section 4(b)(1) of the Act (29 U.S.C. §653(b)(1)) because Northwest was subject to the jurisdiction of another federal agency, the FAA. The evidence adduced at the hearing with

respect to the question of jurisdiction demonstrated that the FAA is required by the Federal Aviation Act of 1958 (49 U.S.C. §1301 et seq.) to regulate all aspects of safety involved in the operation, overhaul, and maintenance of aircraft of air carriers, including Northwest; that FAA exercises its responsibility by regulations promulgated as the Federal Aviation Regulations ("FAR") and published in Title 14 of the Code of Federal Regulations; that the regulation by the FAA is accomplished through the approval of practices and procedures embodied in manuals which each air carrier, including Northwest, is required to submit to FAA for its approval; that the practices and procedures set forth in such manuals are reviewed constantly by at least six full time inspectors employed by the FAA and assigned to Northwest facilities throughout the United States; and that those manuals contain hundreds of occupational safety and health standards and regulations with which aircraft mechanics and other employees are required to comply. Such manuals set forth the detailed maintenance practices and procedures to be followed by employees of Northwest both in regard to technical instructions required to repair, overhaul and maintain aircraft and in regard to the manner in which such overhaul, repair and maintenance is to be performed to assure the personal safety of the employees performing the work.

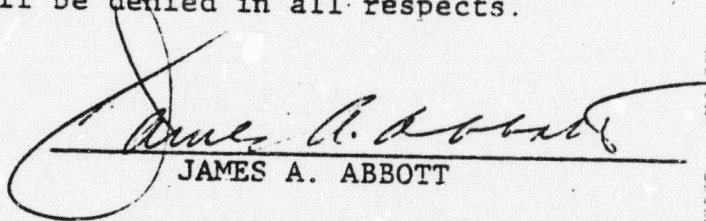
12. The decision of Administrative Law Judge Ditore which held that Northwest was exempt from regulation under the Act was based upon substantial competent evidence that another federal agency, namely the FAA, exercised its jurisdiction to regulate the occupational safety and health of Northwest's employees.

13. The Occupational Safety and Health Review Commission has ordered review of the decision of Judge Ditore including the issue which the Secretary of Labor sought review by the Commission, namely:

"Whether the Administrative Law Judge erred in concluding that pursuant to Section 4(b)(1) of the Act Respondent is exempt from complying with the provisions of Section 5(a)(1) of the Act."

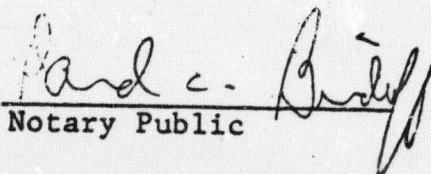
(Exhibit "26" annexed hereto).

WHEREFORE, it is respectfully requested that the relief requested by plaintiff be denied in all respects.


JAMES A. ABBOTT

Sworn to before me this

17th day of December, 1976.


Notary Public

DAVID C. BIRDUFF
Notary Public, State of New York
No. 30-4373115
Qualified in Nassau County
Certificate filed in New York County
Commission expires March 30, 1978

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

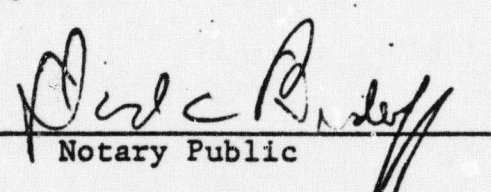
STEPHEN E. SHAY, being duly sworn, states:

I am not a party to this action. On December 17, 1976, I served a copy of the within Affidavits in Opposition upon Francis V. LaRuffa, Esq., Regional Solicitor, U.S. Department of Labor, 1515 Broadway, Room 3555, New York, New York 10036 by depositing the same in an enclosed post-paid properly addressed envelope in the Main Post Office at West 33rd Street and Eighth Avenue, New York, New York, directed to said attorney at the address above stated. I am not a party to this action.



Sworn to before me this

20th day of December, 1976.


Notary Public

DAVID C. BIRDOFF
Notary Public, State of New York
No. 30-5323315
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1978

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 -----x

4 W.J. USERY, Secretary of Labor, :

5 Plaintiff, :

6 -against- :

76-C-2177

8 NORTHWEST ORIFNT AIRLINES, INC., :

9 Defendant. :

10 -----x

11
12 United States Courthouse
13 Brooklyn, New York

14 December 20, 1976
15 3:00 p.m.

16 B e f o r e :

17 HONORABLE EDWARD R. NEAHER, U.S.D.J.

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23 CHERYL FREY
24 ACTING OFFICIAL COURT REPORTER
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Appearances:

FRANCIS V. LA RUFFA, ESQ.
Solicitor's Office
U.S. Department of Labor

BY: PETER VAN SCHAICK, ESQ.
-and-
STEPHEN DUBNOFF, ESQ.
Of Counsel

JAMES NESPOLE, ESQ.
-and-
DAVID BIRDOFF, ESQ.
Attorneys for Defendant

Also present:

THEODORE GOTSCH

1
2 THE COURT: Now we have a protagonist here in
3 this case, the Plaintiff -- or rather, I should say,
4 the Defendant is here to protagonistic at this point.

5 MR. SCHAICK: I am representing Francis V.
6 LaRuffa, the Soliditor's Office, U.S. Department of
7 Labor. My name is Peter Van Schaick. I am here with
8 Stephen Dubnoff who is counsel for Safety and Health --

9 THE COURT: And you are?

10 MR. NESPOLE: I am James Nespole. I am a member
11 of the firm of Reavis & McGrath. We represent
12 Northwest Orient Airlines, and my associate, Mr. David
13 Birdoff of Reavis & McGrath. And the gentleman at
14 the end of the table is Mr. Gene Adams, Vice President
15 and general counsel of the Northwest Orient Airlines.

16 THE COURT: Now in an effort perhaps to see
17 whether we can come to some conclusions without a
18 great deal of argumentation, in view of the papers
19 that have been filed, do I understand that OSHRC, as it
20 is called, is presently appealing a decision previously
21 rendered that bears on this very issue?

22 MR. SCHAICK: OSHRC -- you are correct in that
23 OSHRC is appealing an issue. However, your charac-
24 terization of that as dealing directly with this
25 matter we have to dispute. It is certainly relevant

1 in the defendant has raised it in his hearing. But we
2 believe that it is inappropriately raised at this
3 hearing, and the defendant has an administrative
4 remedy, being as an affirmative defense, any hearing
5 that flows from this inspection. We are here on an
6 ancillary matter which is merely trying to conduct an
7 inspection. And for purposes of this ancillary
8 matter the test for our right to investigate is
9 whether or not the investigation is reasonable. And
10 that is our position here today.
11

12 And to the extent that Judge Ditore's opinion is
13 referred to, it is essentially relevant.

14 THE COURT: I imagine that your position will
15 require a little more illustration, but you're basically
16 moving to vacate -- or rather it was the Magistrate who
17 vacated the inspection warrants.

18 MR. NESPOLE: Yes, sir.

19 THE COURT: Well, you are responding to the
20 order to show cause where the order of inspection
21 should not be reinstated.

22 MR. NESPOLE: Yes, sir.

23 THE COURT: And you have answered by relying
24 essentially on what you say is basically a prior
25 determination of this very issue, and something he has

1
2 said which led me to believe that he does not agree
3 with you that the very issue is involved.

4 MR. NESPOLE: We think that Judge Ditore's
5 hearing which took twenty-four days and over four
6 thousand pages of testimony, fully explored the
7 question of the statutory authority of OSHRC to
8 intrude in the specialized area of airline safety,
9 whether it be amongst its maintenance people or people
10 who fly.

11 We have submitted what we believe is
12 documentary evidence which establishes the extent of
13 the hearing as well as the scope of Judge Ditore's
14 holding. We think that it is administrative res
15 adjudicata and that OSHRC's effort here to obtain an
16 inspection warrant is an attempt to attack that
17 decision while it is pending on appeal before the
18 Commission.

19 We have also pending documentary evidence which
20 we believe establishes that OSHRC's own view of the
21 scope of Judge Ditore's decision is ours. The
22 questions that were presented to the Commission for
23 purposes of review by OSHRC clearly indicate that they
24 viewed Judge Ditore's decision as a broad holding that
25 the maintenance employees of Northwest Airlines are

1 extensively related by the FAA. And that is one of
2 the questions that OSHRC certified to the Commissioner.

3 We have also introduced documentary evidence
4 which shows that the Commission, clearly one of the
5 members of the Commission, indicated that in his view
6 the broad question of jurisdiction of OSHRC over the
7 maintenance employees of Northwest was presented by
8 Judge Ditore's decision and record. And we believe
9 that that has not been rebutted.

10 Of course, your Honor, in addition to the
11 administrative res adjudicata right, we submit that
12 if the Court decides that Judge Ditore's decision is
13 not a holding, then since OSHRC has come into the
14 District Court seeking the warrant and power of the
15 Court to issue a search warrant, it is incumbent upon
16 OSHRC as it is incumbent upon any executive officer who
17 comes before a District Court seeking a warrant to show
18 probable cause. And obviously, the statutory authority
19 is a sine qua non necessary element of probable cause.
20 And so, even if the Court should decide that Judge
21 Ditore's decision is not a holding that we say it is,
22 there is an independent obligation to review OSHRC's
23 alleged statutory authority under the Fourth
24 Amendment to conduct their inspection as they seek.

25 THE COURT: What you are saying that the very

1
2 issue of probable cause would again raise the question
3 of a jurisdiction --

4 MR. NESPOLE: We believe that the statutory
5 authority to conduct a search, and this is what was put
6 forward to Magistrate Catoggio.

7 MR. SCHAICK: Your Honor, I have to dispute the
8 way the issue is characterized presently. I view this
9 proceeding as an enforcement proceeding related to an
10 investigation that Occupational Safety and Health
11 Administration wishes to conduct of their facilities.
12 The argument defendant has raised are arguments which
13 ^{im}are properly put before the Commission. In an action
14 such as this one where we are seeking to enforce the
15 administrative right to investigate matters that are
16 reasonably related to Congressional mandate, the
17 Secretary is not required at the outset to show that
18 the party from whom the Secretary seeks information
19 is within the scope of coverage of the act of the
20 Secretary which is to enforce. That position was first
21 stated in Endicott-Johnson of Perkins v. Endicott-
22 Johnson, 63 Supreme Court 399.

23 And just to repeat that, there they say that the
24 scope of coverage was not an appropriate issue in a
25 hearing to enforce an agency subpoena. That decision

1 was followed. It caused a bit of a turmoil in the
2 circuit and a couple of years later the Supreme Court
3 articulated that same proposition in another case
4 called Oklahoma Press v. Walley. That case is
5 located at 66 Supreme Court 494.
6

7 Thus, the legal principle established in the
8 cases just cited and which was followed by the Second
9 Circuit -- incidentally, in Newmar v. Wirtz at 330,
10 F. 2d 576, holds that the Secretary of Labor has the
11 right to inspect a work site to determine for himself
12 all factual matters relevant, reasonably related to
13 his Congressional mandate.

14 In the cases just cited, the crucial question
15 of coverage jurisdictional issue is at stake. However,
16 here at best, defendants are raising a 4(b)(1)
17 exemption defense. Now an exemption is not an
18 inclusion. Section 4(b)(1) states that nothing in this
19 Chapter shall apply to working conditions. And I
20 emphasize the word conditions of employees with
21 respect to other federal agencies of exercised
22 statutory authority to prescribe or enforce standards
23 or regulations affecting occupational safety and
24 health.

25 Now the focus in that section is on conditions

1 of employees. It does not say employees' establish-
2 ments. The focus is on the particular working situation.
3

4 Thus, in a couple of Circuit Court cases which
5 are appended to our memorandum of law, the Circuit
6 Court held 4(b)(1), the meaning of work conditions was
7 not on the whole establishment, but rather, they had to
8 focus on the particular, the specific working conditions
9 involved, so to restate 4(b)(1) is an affirmative
10 defense.

11 Now, the Occupational Safety and Health Review
12 Commission has held, and I quote, Section 4(b)(1) is
13 not jurisdictional and is in the nature of an affirma-
14 tive defense. Now this case is reported in a
15 specialized hearing house service. So I have brought
16 copies of it. This was not in the brief. This is just
17 on the second page. I have given away my own copy.
18 On the second page it includes the "Section 4(b)(1) is
19 not jurisdictional."

20 Now, the Secretary of Labor maintains that since
21 defendants are raising at most an exemption defense
22 rather than the issue of coverage of jurisdictional
23 issue, that the cases which I cited to your Honor
24 earlier should be applied a fortiori.

25 THE COURT: I notice in the head note that the

1 ruling in this case was that OSHRC had jurisdiction
2 because the Secretary of Transportation had not
3 promulgated rules covering the conditions and the
4 questions.
5

6 Is it your contention that no other agency has
7 promulgated any rules with respect to --

8 MR. SCHAICK: No, your Honor. The sole
9 reason why I have stated that case is to say that the
10 appropriate form in which 4(b)(1) should be discussed
11 is not this proceeding to enforce a mere inspection,
12 but is after a violation, after an inspection has been
13 conducted. If we discover that there are particular
14 working conditions which are not regulated by the FAA,
15 then if the defendant believes that they are in fact
16 regulated for the FAA, we can argue that before the
17 Commission. That is what it is there for.

18 The only point I want to make right now before
19 we get sidetracked on another point, I really raised
20 it just to suggest the point that the 4(b)(1) is not
21 a jurisdictional defense, but is an exemption and
22 belongs in the administrative forum for that reason.

23 One more case that I would like to discuss on
24 this point before we change points: So my point is
25 simply that since it is an exemption, the Oklahoma

1
2 case that I mentioned to you earlier and the Endicott-
3 Johnson case apply a fortiori because it is not a
4 jurisdictional decision. It is a mere affirmative
5 defense to a citation. That is how the Occupational
6 Safety and Health Administration characterizes the
7 issue.

8 So I mean this goes to the whole point that
9 the whole hearing should be limited precisely to the
10 reasonableness of our request for the warrant, and
11 these concerns are extraneous and irrelevant.

12 Now let me point out for the rest of the case
13 which is very instructive, I am going to skip for now
14 and furnish at some later point a sketch outlining the
15 administrative remedy which does exist for defendants
16 to follow.

17 In the Leflin (Phonetic) case which was cited
18 in our brief, I don't have a citation here, it is in
19 the advance sheets within the last four volumes, but
20 the citation is in the brief. There the owners had a
21 cemetery and filed a motion to quash an inspection
22 warrant such as the one that was issued here, which had
23 authorized inspections of the cemetery business to
24 check for violations of the Occupational Health and
25 Safety Act. Leflin argued that the cemetery's

1
2 operations were not within the ambit of the Act because
3 they did not affect commerce and were raising a commerce
4 coverage issue before the District Court.

5 The District Court denied the motion of the
6 cemetery to quash the warrant. The cemetery did not
7 like the results and appealed to the Third Circuit.
8 The Third Circuit held there was an adequate
9 administrative remedy for determination of the issue,
10 and in fact, was so peeved, if you will, at the
11 District Court for entertaining the argument, that it
12 vacated the judgment that the District Court had
13 entered and instructed the District Court to dismiss,
14 not to deny the motion, but to dismiss the motion
15 because the party had failed to exhaust its administra-
16 tive remedies. So I think that is very instructive
17 here and I commend your attention to it.

18 Now I would like to address the issue of
19 probable cause. Again, we believe that in a proceeding
20 such as this one, which is to enforce an agency's right
21 to conduct an investigation of matters reasonably
22 related, and no denying reasonably related to Congress'
23 purposes, that the agency need not know probable cause
24 that a violation exists before it conducts an
25 investigation to determine whether or not violations

1
2 exist in the workplace.

3 Now again, Oklahoma Press that I mentioned
4 efore, 66 Supreme Court at page 506 and Morton Salt,
5 the Morton Salt case 70 Supreme Court at 357 have
6 provided instructions on this matter. The Second
7 Circuit has held in the case of a IRS enforcement
8 proceeding having to do with, it was in a tax case
9 discovery of information reasonably related to investi-
10 gation, the Second Circuit held so stiff a standard as
11 probable cause was not required in an action to enforce
12 an IRS summons.

13 So in the United States v. Rothman (phonetic)
14 388 F. 2d at 523.

15 Finally, defendants have referred in their
16 brief to the case of Favor (phonetic) v. the City of
17 Seattle which appears in 1967. The Supreme Court case
18 dealing with administrative warrants. That case has
19 some instructions which are relevant here, as well.
20 After citing the Oklahoma Press case and Morton Salt
21 with approval, the Court states, the agency's particular
22 demand for access will, of course, be measured in terms
23 of probable cause to issue a warrant against a flexible
24 standard of reasonableness that takes into account
25 public need for effective enforcement of the particular

1 regulations involved. There is a lot of other
2 discussion there, but they really affirm the reasonable-
3 ness of this test as what is appropriate in a hearing
4 to enforce a warrant that has been applied .
5

6 Now something that is also very instructive
7 about this is that the Supreme Court summarized the
8 administrative subpoena law and relied on the Fourth
9 Amendment discussions of administrative subpoenas and
10 the reasonable standard that was developed in those
11 cases, that is Oklahoma Press, Morton Salt and others,
12 and expressly adopted the subpoena analogy to apply
13 to the warrant situation. That is something that
14 should be kept clear.

15 There is an equivalent that is articulated by
16 the Court in this case between the administrative
17 subpoena applications and the warrant applications.

18 I can go on, your Honor, and quote you also,
19 I can refer you to Carma v. Municipal Court, which
20 is the other of those dual companion cases. They are
21 at pages -- there is 387 U.S. at 735. They introduce
22 the reasonableness test as the scope of the judicial
23 inquiry in issuing a warrant and limits, I believe,
24 limits that inquire that judicial inquiry to determine,
25 whether or not the agency has shown that its actions

1
2 are authorized by Congress, that the particular work-
3 place they wished to inspect is one which it is
4 reasonable to believe falls within their Congressional
5 mandate. A general reasonableness test.

6 Again, I must repeat that the defendant's
7 contention that 4(b)(1) gives them an exception that
8 they can argue for in this hearing, I believe is
9 incorrect. This hearing should be limited solely to
10 determining whether or not the warrant was reasonable
11 on its face compared to the statute and that they were
12 in the wrong forum. That is my conclusion.

13 THE COURT: All right, let's hear from your
14 adversary.

15 MR. NESPOLE: I will attempt to be brief.

16 Your Honor, I would like to state at the outset
17 that insofar as the moving papers attempt to suggest
18 to the Court what I call the Commaro (phonetic) theory,
19 namely, that there is some sort of a dangerous
20 condition that exists out of hangar No. 1 of the
21 Northwest facilities at J.F.K. We have to take
22 strenuous dispute with that. The Federal Aeronautics
23 Agency Administration has fourteen inspectors
24 permanently assigned to Northwest Orient Airlines,
25 Northwest Airlines' operations. In addition, at

1
2 Kentucky there are twenty additional FAA inspectors
3 that are at the call of any inspector who is
4 permanently assigned to any airline. So that you have
5 a situation here where another federal agency is
6 intensively and extensively involved in supervising
7 reviewing all phases of Northwest's operations at
8 Kentucky, Minneapolis, or where have you.

9 We also think, your Honor, that the presence of
10 the FAA is very significant in this case. 4(b)(1),
11 however, it is semantically characterized, when the
12 agent calls it an affirmative defense and whether or not
13 that characterization is binding on this Court or
14 whether it's jurisdictional in a sense of power of the
15 Court, I submit to your Honor, that the danger of
16 conflicting exercises of jurisdiction in this kind of
17 case with the demand of OSHRC as against the demand of
18 the FAA are not to be taken lightly. Consequently, we
19 think, your Honor, that the question of the statutory
20 authority to go into an area is very, very germane,
21 particularly when you have an exclusive agency such as
22 the FAA with the expertise and background and training
23 to conduct the type of technical inspections that are
24 involved when you are reviewing safety demands of an
25 airline because as the Supreme Court has said most

1 recently in a case involving Southern California cited
2 in our brief, there is a delicate balance here to be
3 struck between the needs of their safety and safety of
4 the employees. It is not just the question of where
5 you cannot keep your eye on both balls. And the FAA
6 is uniquely the agency that Congress has entrusted to
7 keep their eye on those balls.
8

9 Now I note that agency makes very short shrift
10 of the administrative hearing conducted by Judge Ditore.
11 I call your attention, your Honor, that in the case
12 the application for the search warrant was on
13 November 4, 1976. It was an ex parte application.
14 The Magistrate was not informed of Judge Ditore's
15 decision. When the Magistrate was informed of Judge
16 Ditore's decision the Magistrate felt that it was
17 incumbent upon him as a quasi officer to make inquiries
18 into all phases of the agency's power to come in and
19 ask for a federal search warrant.

20 We submit, your Honor, that Judge Ditore decided
21 this question as to whether or not the maintenance
22 workers of Northwest are subject to the exclusive
23 jurisdiction of the FAA. We believe a fair reading of
24 his decision, a fair reading of questions which the
25 agency itself certified, as well as the opinion of one

1
2 of the Commissioners as to what was presented, was more
3 a surety substantial of the prior administrative
4 process. What we don't understand is how someone after
5 having had a day in court, having a decision against
6 him, can seek to come in again and conduct a search
7 and allegedly establish a new docket if such minor,
8 non-serious violations is found and re-litigate the
9 entire question all over again when the matter is
10 pending before the entire Commission.

11 Now I can understand why in the face of that
12 administrative record the agency declined to inform the
13 Magistrate of the decision. And I note that our
14 contentions regarding the res adjudicata effect of
15 Judge Ditore's administrative hearing have not really
16 been presented to the Court. But in any event, Judge,
17 the question of probable cause has always been a
18 judicial function. I think it is an extraordinary
19 proposition of law that the Executive branch can come
20 into the United States District Court and say we would
21 like a search warrant, please put your signature to it
22 to give us authority.

23 Now I, too, have read the Sea case and I call
24 your Honor's attention specifically to the dissent of
25 Justice Clark. He asked the following, Judge

1
2 why go through such an exercise, such a pretense as
3 the same essentials are being followed under the present
4 procedures?

5 I ask why the money, the delay, the expense, the
6 abuse of the search warrant?

7 In my opinion, this will not only destroy its
8 integrity, but defraud the Magistrates issuing them,
9 and so you bring disrepute not only upon the practice
10 but upon the judicial practice. Thus, we submit, your
11 Honor, that it is incumbent upon any executive officer
12 who is seeking a search warrant and wants to show
13 probable cause.

14 Statutory authority to issue the warrant is also
15 a judicial question. You cannot relegate a person who
16 is going to be submitted to a court to some distant
17 administrative remedy where he has to defend on the
18 entire merits and long after that come into court on the
19 strength of an entire record and debate the question as
20 to whether or not probable cause in terms of statutory
21 authority existed ab initio.

22 We would think to do that would almost be an
23 unconstitutional position. Why should an individual be
24 subject to such a delay, such an expense as well as a
25 violation of his rights by having to submit to a search

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2 and not be heard in terms of whether or not the warrant
3 was based upon statutory authority to search.

4 Now, the line of authority that they cite for
5 the concept of administrative exhaustion centers on
6 Myers v. the National Labor Relations Board. And we
7 think it is interesting in that case, your Honor, that
8 what was sought there was to restrain a hearing before
9 the National Labor Relations Board. There was not any
10 question of whether or not a Fourth Amendment right was
11 being presented to a District Court Judge or a
12 Magistrate in terms of issuing a warrant.

13 Now once that is the case I think you have a
14 whole new ballgame. And if your Honor pleases, we
15 have cited authority in our brief which establishes
16 that OSHRC's representations of probable cause are not
17 binding on the court. They must show probable cause.
18 It is a judicial function to analyze.

19 And in fact, in the few cases that we cite, no
20 probable cause was found and search warrants were
21 refused. Now they cite the Refling case. Most
22 respectfully, Judge, I think that case is a sports and
23 my reading of that case I cannot see if any argument
24 was made regarding the Fourth Amendment question.
25 There is no reference in the opinion. And more

1 interesting, Judge, that case did not arise in a
2 context such as this one, namely, where you had a full
3 administrative hearing on the question of coverage.
4 And they have lost the issue. So I don't think that
5 case is persuasive.
6

7 But to sum it up, your Honor, if this were the
8 case and the theory of preemption, that is exemption
9 posed here were to be adopted, every regulatory scheme
10 would have to look like the Napoleonic Code. OSHRC's
11 contention is that you have to have a specific
12 regulation as to each and every item that in their view
13 they believe is within the purview of their statute.
14 You would have nothing but prolixity and confusion.
15 We have set forth in our moving papers the entire
16 regulatory scheme of the FAA. It runs the whole gamut
17 from a statutory duty to look into the safety of
18 maintenance people to form regulations which are
19 published from the CFR as well as an entire body of
20 manuals which every airline must publish if approved
21 by the FAA and have available to its people working in
22 the field as a ready source of information as how to do
23 a job. The concept of preemption that is suggested
24 here would probably put the law practice back fifty
25 years.

1
2 Counsel may find that to be an extraordinary
3 statement, but imagine how we view an alleged necessity
4 to have certain types of shoes for people who handle
5 heavy equipment, whether the FAA has said have winches,
6 have pulleys, have supports. There are all different
7 kinds of ways to treat it.

8 OSHRC would submit that its way is the most
9 effective and since it is the most effective no one
10 else has covered the area. But obviously, Judge, the
11 FAA has decided that there are ways that it thinks in
12 its expertise that are more appropriate. And that is
13 what this case is all about. Are we to be subjected
14 to the harassment of administrative searches all over
15 the United States as going on now as an action in
16 Wyoming, another one out west? There was an attempt
17 here in New York after an administrative hearing was
18 held here on Upper Broadway and so forth. The issue
19 is going to be resolved by the Commission. They have
20 their appeal. But still even if this Court feels that
21 that is not a positive argument, the Fourth Amendment
22 points must be reached. And we just don't think that
23 the Magistrate or this Court can really be reduced to
24 a rubber stamp in the form of a request for a search
25 warrant without making inquiries into the statutory

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2 authority to conduct such a search. We think that is
3 elementary.

4 MR. SCHAICK: Your Honor, I feel compelled to
5 address a couple of, I believe, misleading points that
6 have been raised by the defendant. May I proceed?

7 THE COURT: Yes.

8 Before you do, I was taking a quick look at
9 Sections 29 U.S.C. 653(b)(1), which is what you are
10 talking about. The provision that says that nothing
11 in the --

12 MR. SCHAICK: Exactly.

13 THE COURT: Shall apply to working conditions of
14 employees with respect to other federal agencies and
15 state agencies, etc., etc., statutory authority to
16 prescribe or enforce standards or regulations
17 affecting occupational and safety and health.

18 Do you say that that issue was not involved in
19 the proceeding before Judge Ditore?

20 MR. SCHAICK: The issue was clearly involved in
21 the proceeding. I might, incidentally, say that
22 Judge Ditore's opinion is not a final order, but that
23 is just parenthetically.

24 MR. DUBNOFF: Can I explain what is going on
25 with that case?

A 106

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2 THE COURT: Yes.

3 MR. DUBNOFF: The citation was issued for a
4 violation of 5(a)(1) of the Act which alleged a
5 violation of the general duty clause. The general duty
6 clause is part of two requirements in which an employer
7 is required to follow. One, he keep his employee free
8 of recognized hazards which are causing injuries or
9 death. The second part is 5(a)(2) of the Act which
10 deals with the standards promulgated by the Secretary
11 and they cover hundreds of pages. This particular
12 instance arose out of an inspection at JFK and dealt
13 with a violation, we alleged a violation of Section
14 5(a)(1), dealing with maintenance personnel who were
15 changing landing flights in certain Boeing 747 aircraft
16 owned and maintained and operated by the Respondent
17 Northwest Airline.

18 Judge Ditore ruled that as to that specific
19 working condition that Section 5(a)(1) which is an
20 individual violation, we were in fact preempted by a
21 manual, part of which has been attached to
22 Defendant's papers.

23 I might add that we did not have a chance to
24 fully prepare on defendant's papers since we didn't
25 receive them until this morning and we asked for them

1 Friday afternoon and we were told they would be ready --
2 that case is now on appeal. 5(a)(1, by its nature can
3 only apply to a specific working condition at a specific
4 facility at a specific time. So even if the
5 Respondent eventually were to prevail before the
6 Commission, still Section 582 which deals with all the
7 standards was not addressed by Judge Ditore and not at
8 any time part of that particular hearing. And while it
9 is true at the hearing that the Respondent, then
10 Northwest Orient Airlines, did raise the question of a
11 total exemption and they maintained it in their papers,
12 I believe from their answer all the way through and
13 in fact, sought to have the hearing first held on the
14 basis of 4(b)(1) without taking any testimony, Judge
15 Ditore's decision, a reading of it -- and I need not
16 go through it again, and you have it appended in your
17 brief and also Defendants clearly hold that as to that
18 specific working condition, the Occupational Safety and
19 Health Administration was in fact preempted. That
20 order is on appeal. But for your Honor to decide the
21 question of who is and who is not preempted, the very
22 question that the Review Commission has been designed
23 to adjudicate, and we are not here today seeking to
24 collaterally attack Judge Ditore's decision, this
25

1 inspection that was attempted to be made was a new one.
2 It did not involve leading edge flaps nor a complaint
3 dealing with that particular instance. We sought to
4 inspect hangar No. 1 where there had been previous
5 instances of violations of standards, Section 5(a)(2) of
6 the Act.
7

8 Northwest by its position is arguing that
9 because of an administrative law, the Judge held that
10 one specific instance, 5(a)(1) they have been exempted
11 from coverage, that there is a section covering the
12 entire facility of JFK Airport notwithstanding the
13 fact that he did not excuse 5(a)(2) which is the
14 standard part of the Act --

15 THE COURT: I understand what you are saying
16 and you make it clear, but (b)(1) seemed rather
17 explicit in saying that nothing in this Chapter --
18 now, of course, I do not have the whole Act before me,
19 but the Chapter applies to geographic and in the head
20 note geographic applicable judicial enforcement --

21 MR. SCHAICK: Chapter 15, I believe it refers
22 to the entire Act.

23 THE COURT: It says nothing in the chapter then
24 shall apply to working conditions of employees with
25 respect to which other federal agencies -- I will

1
2 forget the state agencies, exercise statutory
3 authority to prescribe or enforce standard or
4 regulations affecting occupational and safety and
5 health. So it certainly seems from a prima facie
6 reading that it was the intention of Congress to carve
7 out of OSHRC's authority any work conditions of
8 employees as to which other agencies exercised authority
9 to prescribe enforced standards.

10 Is it basically your point that the FAA does not
11 prescribe or enforce standards or regulations?

12 MR. DUBNOFF: That is not our point. In fact,
13 the Secretary is entitled by our inspection, what we
14 are arguing for --

15 THE COURT: Let me say this to reassure you, I
16 understand what your colleague is saying about the
17 matter in which questions you believe, questions that
18 go to the essential authority, let's say to issue a
19 warrant, may well contemplate some limitation in the
20 respect that the warrant that an attack or challenge
21 to the warrant could only be raised after there has
22 been an inspection and the agency has taken some steps
23 to do something about what it claims it does not find
24 right.

25 MR. DUBNOFF: The case of 4(b)(1) --

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2 THE COURT: I understand that point, but the
3 only thing that I find a little in conflict with that
4 is the language in (b)(1) which seems to suggest that
5 nothing in the chapter shall apply which seems to carve
6 out absolutely any area where the authority is in
7 another agency to prescribe or enforce standards.
8 Standards now, mind you, not regulations but standards
9 affecting occupational safety or health.

10 MR. DUBNOFF: The railroad case which was cited
11 to you earlier disposes of that argument where they
12 claim there is no such thing as an industry exemption
13 thereof. The railroad people argued because the FAA
14 promulgates certain standards that OSHRC was precluded
15 from investigating the entire facility because at least
16 partially they are in fact and they are conceded to be
17 covered as far as the FAA is concerned. We cannot as
18 officers of this Court stand before you and say there
19 is no instance where the FAA had prescribed regulations
20 that covered certain conditions that JFK terminal --
21 I am sure there are some.

22 However, the point is that you have a right to
23 determine that for yourself and that if --

24 THE COURT: Let me call your attention to the
25 statutory language. It does not say have exercised

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2 their statutory authority, but where they have not.

3 Do you understand the difference? That is to
4 say, the area carved out is not merely where the FAA
5 has actually prescribed, but where it has the authority
6 to do so.

7 MR. DUBNOFF: Well, the courts have intended that
8 as to where they will actually issue regulations --

9 THE COURT: That may or may not be correct.

10 MR. DUBNOFF: But even if they are not co-
11 extensive or the same as OSHRC or whether or not they
12 benefit the employees, a regulation is promulgated,
13 published by another agency --

14 THE COURT: Well, it suggests very strongly that
15 the intention of Congress was to avoid duplication --

16 MR. DUBNOFF: And clearly we would not be able
17 to issue any valid citation where another agency has
18 issued a regulation covering that. And any citation
19 issue where another agency had in fact exercised its
20 jurisdiction would be void as a matter of law.

21 And the question, therefore, should be before
22 the Review Commission, not before a District Court on
23 a case-by-case basis. Now even where a jurisdictional
24 exemption from the Act, which would be the same as a
25 Congress-caused coverage --

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2 THE COURT: But you said, of course, in the
3 context, that you made a complaint about a specific
4 practice or --

5 MR. DUBNOFF: A specific working condition.

6 THE COURT: And in that case you were met with --

7 MR. DUBNOFF: A substantial argument.

8 THE COURT: That the FAA had in fact covered
9 that in some way. But does that obviate, however, the
10 question as to whether it had or had not made the
11 regulation? Wouldn't a reviewing authority still have
12 to deal with the fundamental, broad question of
13 whether the FAA was an agency which had the authority
14 to do certain things, even though it neglected to do
15 them?

16 MR. DUBNOFF: And still go before the
17 Commissioner?

18 MR. NESPOLE: May I speak?

19 THE COURT: Go ahead.

20 MR. NESPOLE: In terms of the authority that
21 was brought to the Court involved the railroad case,
22 which I think is interesting that in the very case
23 that is cited by the agency conceding that the FRA
24 has not exercised its authority to regulate employees'
25 safety and railroad shop and repair facilities such as

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2 the Hayne shop In other words, the FRA had not
3 exercised its authority. They had done nothing. That
4 is not this case. And the set of facts in respect to
5 the FAA --

6 THE COURT: Let me ask you this: Is it your
7 position, Northwest's position that the FAA has in
8 effect covered every cubicle inch of hanger No. 1 by
9 regulations --

10 MR. NESPOLE: Your Honor, in terms of a
11 reasonable interpretation of the FAA and the
12 regulations and the scope of the inspection, and what
13 have you, we say yes. Now the agency itself perceived
14 that because Judge Ditore made a specific finding that
15 the FAA had exercised this kind of jurisdiction and
16 the agency took steps --

17 THE COURT: Your colleagues here, though, say
18 that it really focused on that particular working
19 condition or practice, or whatever, with respect to the
20 leading knowledge of the Boeing 747.

21 MR. NESPOLE: That is what has been referred to
22 as the concept of the nook-and-cranny theory of
23 regulations. And it is their contention that unless
24 another agency is in every nook and every cranny, that
25 leaves room for OSHRC. What might be the rule with

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2 respect to other industries cannot be the rule when
3 you have a prior federal statute with a federal agency
4 expertise associated with the performance of their
5 duties, the degree of the presence that they have in
6 the industry that make it another ballgame. And
7 therefore, references to other areas where there has
8 been no other regulation or no presence, we just don't
9 think that is correct, that is not the case.

10 THE COURT: Of course, the only thing from
11 recent experience -- well, it may not really be an
12 analogy, where doctors were complaining because the
13 Food and Drug Administration issues a notice of
14 inspection to inspect their offices to see whether or
15 not drugs meet the standards of the FDA.
16 And I don't recall anybody saying they have to have
17 a warrant to do that.

18 Let me put it this way: I have, I should
19 withdraw that --

20 The original notice is a request of permission
21 to inspect. Then they may, if that is turned down,
22 I think that is what it is, their first effort is
23 maybe --

24 MR. NESPOLE: Your Honor, I think that in
25 addition to that, apart from the non-consensual

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2 situation where records are required to be kept by law
3 pursuant to an independent statute, then I question
4 whether or not there is any necessity to get a warrant
5 when you want to look at the specific records.

6 There was a case in the New York State system --

7 THE COURT: This was to actually inspect the
8 inventory of drugs, I believe.

9 MR. NESPOLE: I believe even in that situation
10 there is a requirement of record keeping.

11 THE COURT: There is a requirement of record
12 keeping.

13 MR. NESPOLE: And since you have the initial
14 statutory information record keeping it is really
15 analogous to a pre-consent situation. Now that is not
16 what prevails here. And the agency itself realizes
17 that it is subject to the Fourth Amendment that where
18 there is a non-consensual situation as there is here
19 because of a prior determination, then it is
20 incumbent upon them to obtain a warrant. And I don't
21 think there is any debate upon the interpretation of
22 the statute.

23 THE COURT: It is obvious they thought they had
24 to obtain a warrant --

25 MR. NESPOLE: An ex parte.

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2 MR. SCHAICK: I have just one small point I would
3 like to go over again with your Honor. It concerns
4 again the reading of the section 4(b)(1). If we can
5 just go back to that text.

6 THE COURT: All right.

7 MR. SCHAICK: The words that are really
8 important to me in Section 4(b)(1) nothing in this
9 chapter shall apply to working conditions, not
10 establishments, working conditions of employees. The
11 focus is not on whole establishments but is on working
12 conditions. Now when I refer you to those railway
13 cases in our brief they will cover for you some of the
14 discussion that they thought was necessary of that
15 language. And just to remind you again the industry-
16 wide exemption reading of Section 4(b)(1) which is a
17 plausible reading on its face, ambiguous, in fact I
18 believe the Court refers to Section 4(b)(1) as
19 proclaiming its rights in Delphic terms, meaning
20 ambiguous, nobody knows what they mean --

21 THE COURT: Well, if we may backtrack a minute,
22 what is your point with respect to the emphasizing of
23 conditions and not establishments? Are you suggesting
24 that it is a limitation? The normal interpretation of
25 working conditions would certainly include the place

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2 where workers --

3 MR. SCHAICK: Right, but the focus is on the
4 particular aspect of the work being done, whether the
5 airplane which the FAA --

6 THE COURT: I understand that. I can understand
7 that. In other words, I am not blind to the fact that
8 the primary function, indeed I guess the original
9 function of the FAA when it was the former agency, was
10 aircraft safety.

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12 (continued next page)
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2 THE COURT: (Continuing) Aircraft, I suppose,
3 landing, too. The landing facilities and everything
4 else.

5 MR. NESPOLE: That has been expanded well beyond
6 the initial declaration oath in the regulations and the
7 manuals that every airline must promulgate and have
8 approved and supervised by the FAA --

9 THE COURT: With respect to the maintenance.

10 MR. NESPOLE: They are covered.

11 THE COURT: I mean with respect to the
12 maintenance of conditions where the work is done.

13 MR. NESPOLE: Yes, that concept has expanded
14 beyond the initial statutory declaration. In fact,
15 Judge Ditore noted that that is no longer the case and
16 that argument misses the point, that the FAA is very
17 much concerned with the welfare of maintenance people.
18 In fact, your Honor, for a reference might be in order,
19 you can envision a situation where OSHRC might require
20 a safety device which in its view is for the protection
21 of ground people, but yet at the same time might pose a
22 serious problem to the airworthiness of an aircraft.
23 OSHRC's penalties are civil and criminal, but the FAA
24 can put you out of business. It can take your license
25 away and set you down. And even if you get a stay, your

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2 business is affected by virtue of the fact that the
3 world at large knows you have been set down. And that
4 is a tough thing. That has a very deleterious effect
5 on people's conduct in the business.

6 Interestingly enough, Judge, there was a total
7 refusal here on the part of the agency to reconcile any
8 kind of conflict that they might have perceived here
9 in their statute with the FAA statute. Judge Ditore
10 granted the agency a seventy-day request for purposes
11 in consulting, and I gather that was never done. The
12 Magistrate Cattogio suggested that if there were any
13 conflicts here, perhaps the agency communication would
14 be in order. I understand at this point there is some
15 question as to whether or not, for example, you have
16 to have rigid barriers over the doors to protect
17 employees who might be fueling a plane, or what have
18 you. And the airline industry, they have always used
19 a canvas guard.

20 Now, the question whether or not you have a
21 rigid barrier is how much weight you add to the plane.
22 So that you've got to have that one agency with the
23 all-knowing resources to tell you what to do.

24 MR. SCHAICK: Your Honor, I didn't get a chance
25 to continue my point.

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2 THE COURT: I realize we are getting down to the
3 nitty-gritty problems and I am sure the Court is not
4 going to be competent to do very much about it.

5 MR. SCHAICK: The agency has their witness
6 expertise for making a determination on particular
7 working conditions about whether or not an exemption
8 does exist. And so you have a better sense of what is
9 developed, the Commission has held that there is a
10 three element test in an affirmative defense for
11 4(b)(1) argument to be made. And that is just very
12 briefly, that the defendant must show that there is a
13 constant purpose between the FAA and the Occupational
14 Health and Safety regulations concerning a particular
15 working condition. That is a concern for health and
16 safety, safety and health for employees. And actual
17 exercise of that authority is the second test. And
18 third, that the actual exercise of an authority
19 covers the specific working conditions which are
20 mentioned in the citation for violations. This was
21 articulated by the Commissioner clearly in the railway
22 case when it appeared before the Commission.

23 Now I say this to indicate to you again why the
24 exemption rule is appropriate in this situation. The
25 agency exists for the purposes of making initial

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2 determinations of the issue.

3 My second point that I would like to make before
4 closing is to reemphasize again the narrow scope of
5 enforcement hearings where there is an issue about
6 whether or not an administrative agency has the
7 authority to inspect a particular workplace. Again,
8 referring to Oklahoma Press and Endicott-Johnson cases
9 where lower courts have failed to follow the
10 instructions that are in those cases, such as in the
11 Kraft case, the Ninth Circuit 244 F. 2d at 890, the
12 Supreme Court has reversed it merely citing Oklahoma
13 and Endicott. They believe that the issue of the
14 scope of these enforcement proceedings is limited.
15 And this is in the context of the Fourth Amendment.
16 Discussion is limited to the reasonableness of the
17 instruction comparing the focus of the inquiry against
18 Congress' mandate, checking to make sure that it is
19 not a fishing expedition, looking for things that in
20 no conceivable reading of the statute could fall
21 within the statute. And that this is the sole
22 judicial role in investigative proceedings. And that
23 is not an enforcement proceeding but merely trying to
24 conduct an investigation.

25 I thank you.

1 THE COURT: All right.

2 Well, I think I have heard enough.

3 MR. NESPOLE: We commend you to our brief.

4 THE COURT: I assume by the size of it it
5 covers the waterfront. All I can do, gentlemen, is
6 assure you that while reserving decision I will try to
7 give it my careful attention and arrive at a just
8 result consistent with law.
9

10 * * *

Transcript of Minutes dated December 20, 1976
before Hon. Edward R. Neaher, U.S.D.J.

Memorandum and Order dated June 10, 1977 of Hon.
Edward R. Neaher, U.S.D.J., Directing Magistrate
to Reinstate Inspection Warrant.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

☆ JUN 11 1977 ☆

----- -X TIME A.M.
P.M.

W. J. USERY, JR., Secretary of :
Labor, U.S. Department of Labor, : 76 C 2177

Plaintiff, :
-against- :
NORTHWEST ORIENT AIRLINES, INC., :
Defendant. :
----- -X

MEMORANDUM
AND
ORDER

APPEARANCES:

FRANCIS V. LA RUFFA, ESQ.
Regional Solicitor, Department
of Labor
Attorney for Plaintiff
By PETER VAN SCHAICK, ESQ.
STEPHEN DUBNOFF, ESQ.

REAVIS & McGRATH
Attorneys for Defendant
By JAMES NESPOLE, ESQ.
DAVID BIRDOFF, ESQ.

NEAHER, District Judge.

Upon ex parte application of the Secretary of Labor
("Secretary"), a United States Magistrate on November 4, 1976
issued a warrant authorizing the inspection of a hangar oper-
ated by defendant Northwest Airlines, Inc. at John F. Kennedy

("JFK") International Airport. The next day, after being informed by defendant of a prior administrative law judge's decision determining that defendant was exempt from the jurisdiction of the Occupational Safety and Health Administration ("OSHA") in respect of the landing light working area of defendant's Boeing 747 aircraft, the Magistrate vacated the inspection warrant. The Secretary thereupon brought this action for an order (1) directing the Magistrate to reinstate the inspection warrant or (2) compelling defendant to submit to an inspection.

Jurisdiction exists under 28 U.S.C. §§1337 and 1345. See Brennan v. Buckeye Industries, Inc., 374 F. Supp. 1350 (S.D. Ga. 1974). The secretary seeks the inspection warrant or order of inspection pursuant to Section 8(a) of the Occupational Safety and Health Act ("Act"), 28 U.S.C. §657(a).

I.

The origins of this dispute began in early 1975 following OSHA inspections of defendant's Hangar No. 1 at JFK International Airport. Defendant was then cited on two separate occasions for violation of the National Electrical

Code and other safety standards designed to protect employees from injury. Defendant at first contested the citations but later withdrew and paid civil penalties imposed. A further citation was issued following inspections of defendant's aircraft terminal in April 1975. It was then charged with failing to provide adequate means to protect ground maintenance employees, while changing landing lights on Boeing 747 aircraft, from the hazard of being crushed by the aircraft's electro-pneumatically controlled leading edge flaps. This was categorized as a "serious" violation and was promptly contested by defendant.

At the hearing on the charges before an administrative law judge, defendant raised a defense that it is exempt from the provisions of the Act pursuant to section 4(b)(1):

"Nothing in this chapter shall apply to working conditions of employees with respect to which other federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

Defendant argued that the Federal Aviation Administration ("FAA") had exercised its statutory authority to prescribe regulations for the safe working conditions of aircraft ground maintenance personnel.

Testimony during the 24-day hearing concerned the alleged violation, FAA regulations, and defendant's rules and regulations. Midway during the hearing the Secretary was granted a 70-day recess during which OSHA and the FAA were to attempt to resolve the jurisdictional dispute. When the hearing reconvened, however, no resolution had been reached, and the hearing proceeded to its conclusion on February 4, 1976.

On September 28, 1976 the administrative law judge handed down a decision and order dismissing the complaint solely on the basis of defendant's affirmative defense that it was exempt from OSHA regulation pursuant to section 4(b)(1) of the Act. The judge held that Congress, in conferring broad authority on the FAA to ensure safety in air transportation, included within that mandate the safe working conditions of airline ground crews when performing aircraft maintenance work. See 40 U.S.C. §1421. Based on the evidence adduced at the hearing, the judge also found that the FAA had exercised its authority by requiring each air carrier to maintain a maintenance manual which must include all instructions and information necessary for its ground maintenance crews to perform their duties and responsibilities with a high

degree of safety. The administrative law judge concluded that OSHA "is precluded from exercising its jurisdiction in the specific landing light working area" of the aircraft because defendant "is exempt pursuant to section 4(b)(1) of the Occupational Safety and Health Act of 1970, from complying with the provisions of section 5(a)(1) of that Act." Section 5(a)(1) requires employers to provide their employees with safe places of employment.

On October 26, 1976 the Secretary requested the Occupational Safety and Health Review Commission ("Commission") to review the order of the administrative law judge, and two days later a member of the Commission granted the petition for discretionary review. The court has not been informed of the outcome, if any, of that appeal.

Turning now to the instant controversy, on October 27, 1976 an OSHA compliance officer, attempting to make a further inspection, was refused entry to defendant's Hangar No. 1 at JFK International Airport. The officer thereafter applied to the Magistrate for a warrant authorizing such an inspection. The warrant was granted on November 4, 1976. The next day the officer again attempted to enter Hangar

No. 1 and was again rebuffed. Later in the day counsel for defendant notified the Secretary that he would request the Magistrate to quash the warrant. The Magistrate, after hearing argument from both sides with respect to the effect of the administrative law judge's decision described above, immediately vacated the inspection warrant with the following brief statement:

"Vacated in view of FAA preempting at least part of the area as indicated to me today for the first time as per decision of Administrative Judge Ditore, Sept. 28, 1976."

The present action ensued.

II.

It is well established that one who wishes to challenge an agency's jurisdiction first must exhaust his administrative remedies. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). "[T]he courts are forbidden to determine coverage prior to the [agency's] quasi-judicial proceeding for deciding that question" Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 213 n. 51 (1946). Therefore, questions concerning the coverage of

OSHA are presentable first to the Commission, which rules on complaints filed by the Secretary when an employer contests a citation, and then, on appeal, to the Court of Appeals. 29 U.S.C. §§659(c), 660. On the basis of the Myers rule, a recent action to quash an OSHA inspection warrant on the ground that the employer's operations were not covered by the Act was dismissed. Matter of Restland Memorial Park, 540 F.2d 626 (3 Cir. 1976).

Despite the breadth of this rule, defendant argues that it does not apply here because the exemption issue has already been determined in its favor by the administrative law judge in the prior proceeding. Before the operation of the res judicata doctrine is triggered, however, both the parties and the issues in the two proceedings must be identical. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597-98 (1933); Expert Electric, Inc. v. Levine, sl. op. 3457, 3466 (2 Cir. May 12, 1977). The issue before the administrative law judge cannot be considered identical to the one before this court. Whereas the prior proceeding was limited to the issue of whether FAA safety regulations concerning the changing of landing lights on defendant's Boeing

747 aircraft precluded OSHA from imposing its own regulation on such work, this action involves the working conditions in an entire hangar. To the extent the decision of the administrative law judge appeared to grant defendant an exemption covering all the conditions under which its ground maintenance employees work, it must be considered obiter dicta in light of the narrow point actually at issue.

Courts are in agreement that section 4(b)(1) of the Act was not intended to create industry-wide exemptions. Baltimore & Ohio R. Co. v. OSHRC, 548 F.2d 1052 (D.C. Cir. 1976); Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5 Cir. 1976); Southern Ry. Co. v. OSHRC, 539 F.2d 335 (4 Cir.), cert. denied, ___ U.S. ___ (1976). Neither was it meant to exclude from the Act's coverage all working conditions in defendant's hangar simply because the FAA has exercised its authority to regulate with respect to the safety of employees changing landing lights on an aircraft.

An additional obstacle in defendant's path is that only a final decision can be res judicata. Sterling Drug, Inc. v. Weinberger, 509 F.2d 1236, 1240 (2 Cir. 1975). While final administrative determinations can be as conclusive as

judicial decisions, United States v. Utah Construction Co., 384 U.S. 394, 421-22 (1966), in this case defendant is presenting merely the initial decision of an administrative law judge which is not the final order of the Commission under 29 U.S.C. §661(i). Since the Commission is still reviewing that decision, it is not entitled to res judicata effect.

In the absence of any binding effect of the determination of the administrative law judge, the inspection warrant should not have been vacated. Assuming that a warrant was required in order to make the inspection, the initial application, which noted previous violations of the Act by defendant, provided a sufficient showing of probable cause for its issuance. While the court views a warrant as unnecessary, see Brennan v. Buckeye Industries, Inc., 374 F. Supp. 1350 (S.D. Ga. 1974), the Supreme Court may decide otherwise in its review of Barlow's, Inc. v. Usery, 424 F. Supp. 437, prob. juris. noted, 45 U.S.L.W. 3690 (1977).

Accordingly, the Magistrate is directed to reinstate the inspection warrant for defendant's Hangar No. 1.

SO ORDERED.

The Clerk of the Court is directed to forward copies of this memorandum and order to the attorneys for the parties.

Edward R. Weather

U. S. D. J.

Dated: Brooklyn, New York
June 10, 1977

Notice of Appeal of Defendant Northwest Airlines,
Inc., dated June 15, 1977 (directing the re-in-
statement of a Warrant issued by Magistrate Vincent
Catoggio on November 4, 1976).

ORF
D files

A 133

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
W. J. USERY, JR., Secretary of Labor, :
United States Department of Labor, :

Plaintiff, :

-against- :

76 Civ. 2177 (E.R.N.)

NORTHWEST ORIENT AIRLINES, INC., :

Defendant. :

NOTICE OF APPEAL

-----x

SIRS:

PLEASE TAKE NOTICE that defendant Northwest Airlines, Inc., incorrectly named herein as Northwest Orient Airlines, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from an order of this Court, dated June 10, 1977, and entered in the Office of the Clerk of the United States District Court for the Eastern District of New York on the 11th day of June, 1977, directing the reinstatement of a warrant issued by Magistrate Vincent Catoggio on November 4, 1976, permitting the inspection of Hangar No. 1, J.F.K. International Airport, Queens, New York, and from each and every part thereof,

6/15/77

Dated: New York, New York
June 15, 1977

REAVIS & McGRATH

By

JAMES NESPOLE

A Member of the Firm
Attorneys for Defendant
345 Park Avenue
New York, New York 10022
(212) 752-6830

TO: Francis V. La Ruffa, Esq.
Stephen D. Dubnoff, Esq.
Peter van Schaick, Esq.
U.S. Department of Labor
Attorneys for Plaintiff
1515 Broadway
New York, New York 10036

Order to Show Cause dated June 20, 1977 for
Re-argument and Reconsideration to Vacate
the Court's Order of June 10, 1977, etc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 135

-----X
W. J. USERY, JR., Secretary of Labor, : 76 Civ. 2177 (ERN)
United States Department of Labor, :

Plaintiff, :

-against- :

ORDER TO SHOW CAUSE

NORTHWEST ORIENT AIRLINES, INC., :

Defendant. :

-----X
Upon the annexed affidavit of James Nespole, sworn to on the
20th day of June, 1977, it is

ORDERED, that the plaintiff show cause at a hearing to be
held in Courtroom , United States District Court for the Eastern
District of New York, 225 Cadman Plaza East, Brooklyn, New York, on
the 7 day of June, 1977 at 10:00 o'clock in the forenoon of that day
or as soon thereafter as counsel can be heard, why an order, pursuant
to Rule 8 of the Federal Rules of Appellate Procedure, Rules 60(b) and
62 of the Federal Rules of Civil Procedure, and Rule 9(m) of the
General Rules for the Eastern District of New York should not be entered:
(a) granting defendant leave to reargue the plaintiff's application,
made by Order to Show Cause dated December 2, 1976, for an order which
directed, inter alia, the United States Magistrate to reinstate an

6-30-77

inspection warrant, and upon reargument and reconsideration, ^Avacating this Court's order of June 10, 1977, wherein such application was granted, on the ground that the Court overlooked certain matters and controlling decisions in making its determination; and (b) staying the operation of this Court's order, dated June 10, 1977 pending the hearing and determination of (i) the motion for reargument and reconsideration and (ii) defendant's appeal from this Court's order, dated June 10, 1977, to the United States Court of Appeals for the Second Circuit, and for such other and further relief as may be just and proper, and

IT IS FURTHER ORDERED, that service of a copy of this order and of the papers upon which the same is granted, on the plaintiff, or his attorneys, on or before June . . . , 1977 shall be sufficient service of this order, and

IT IS FURTHER ORDERED, that until the hearing and determination of this motion, all proceedings to enforce the order at issue herein are stayed, and the plaintiff and his counsel are hereby similarly stayed from taking any action in connection with said order. *Right for the obtaining of A warrant as directed in the Court's order of June 13, 1977.*

DATED: New York, New York
June 20, 1977

/s/

U.S.D.J.

Affidavit of James Nespole in
Support of Motion for Reargument, etc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 137

- - - - - x

W. J. USERY, JR., Secretary of
Labor, United States Department
of Labor,

Plaintiff,

-against-

NORTHWEST ORIENT AIRLINES, INC.,

Defendant.

:
:
:
:
:
:
:

76 Civ. 2177 (E.R.N.)

AFFIDAVIT

- - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES NESPOLE, being duly sworn, deposes and says:

1. I am a member of the firm of Reavis & McGrath, the attorneys for the defendant herein. I submit this affidavit in support of the motion of defendant Northwest Airlines, Inc., incorrectly sued herein as Northwest Orient Airlines, Inc. ("Northwest"), for an order: (1) staying the operation of this Court's order, dated June 10, 1977, pending: (a) the motion for reargument and reconsideration; and (b) the hearing and determination of defendant's appeal from such order to the United States Court of Appeals for the Second Circuit; and (2) granting leave to reargue, and upon such leave, vacating the order, dated June 10, 1977 which directed the reinstatement of an inspection warrant relating to Hangar No. 1. On June 16, 1977, Northwest served and filed its notice of appeal from that order.

2. In its decision and order, dated June 10, 1977, this Court held that: (1) an employer who wishes to challenge the jurisdiction of the Occupational Safety and Health Administration ("OSHA") must first exhaust administrative remedies; (2) the decision of Occupational Safety and Health Review Commission Administrative Law Judge Jerome Ditore, wherein he held that Northwest was exempt from the Act, should not be afforded res judicata effect; (3) the Fourth Amendment to the United States Constitution did not require plaintiff to obtain an inspection warrant; and (4) even if an inspection warrant were required, the previous alleged violations of the Occupational Safety and Health Act of 1970 provide sufficient probable cause for the issuance of a warrant.

THE ORDER SHOULD BE STAYED

3. Granting a stay will not result in injury to the plaintiff or Northwest's employees; the failure to issue a stay, however, will irreparably injure Northwest. As indicated in this Court's decision and order, the genesis of the present action stems from events commencing in February and March, 1975, at which time plaintiff cited Northwest for alleged safety violations in Hangar #1 at the John F. Kennedy International Airport, the premises plaintiff presently seeks to inspect. It was not until October 27, 1976 that plaintiff expressed any interest in reinspecting that hangar, and it was not until November 4, 1976 that plaintiff applied for an inspection warrant. This hiatus of 19 months indicates that the plaintiff had no reason to believe that the working conditions at the hangar presented any threat to the safety of Northwest's employees.

4. It is equally significant to note plaintiff's failure to seek a prompt resolution of his jurisdictional dispute with the FAA over defendant's ground maintenance personnel facilities. On November 7, 1975, during the pendency of the proceeding before the Occupational Safety and Health Review Commission, Judge Ditore afforded plaintiff an opportunity to arrive at an accomodation with the FAA during a 70-day recess. No accommodation was reached, and, in fact, OSHA officials made no attempt during that period of time to confer with the FAA.

5. Lastly, plaintiff waited almost one month after Magistrate Catoggio vacated the inspection warrant on November 5, 1976 before making the application before this Court for an inspection warrant. Although argument on plaintiff's application was held on December 20, 1976, in the six (6) months between that date and June 10, 1977, when this Court made its decision, no attempt was made by plaintiff to obtain an expedited decision due to any potentially dangerous working conditions at the hangar in issue. Under these circumstances, plaintiff cannot claim that an urgent need exists to inspect defendant's premises. Such a contention is belied by plaintiff's own actions.

6. No harm would occur to the public if the stay is granted. In opposing plaintiff's application, Northwest demonstrated that it is extensively regulated by the FAA with respect to the working conditions at issue. The extent of those regulations, which have been codified in the Federal Aviation Regulations ("FAR"), and which have been published in Title 14 of the Code of Federal Regulations, indicates that the FAA

regulates all aspects of safety involved in the operation, overhaul and maintenance of aircraft. As indicated in the affidavit of William Huskins, Jr., sworn to the 17th day of December 1976, submitted in opposition to plaintiff's application, the FAA maintains a staff of 20 full-time inspectors who have free access to all of defendant's facilities at any time, and it is not uncommon for such inspectors to be on the premises, or to make unannounced visits to the premises, on many occasions. As a result, the FAA is extensively regulating the safety of the employees who work in Hangar No. 1. No void concerning the regulation of these employees' safe working conditions would result from the granting of this application. Consequently, no harm would inure to the public or such employees if the order appealed from were stayed pending a determination of the appeal by the United States Court of Appeals for the Second Circuit.

7. On the other hand, Northwest will be irreparably injured if a stay pending appeal is not entered. Since the primary issue before the appellate court centers on plaintiff's right to enter upon and inspect Northwest's premises, if plaintiff should be permitted to conduct such an inspection while an appeal is pending in respect to the order granting such relief, then Northwest would have been subjected to an illegal search if the order should ultimately be reversed on appeal. Furthermore, to permit an inspection pending appeal would render moot the question presented on appeal. Moreover, as this Court recognized in its order, those portions of the Act upon which plaintiff's request for a warrant is predicated have been declared unconstitutional by a federal three-judge district

court in Barlow's, Inc. v. Usery, 424 F. Supp. 437 (D.C. Idaho 1976). Although this Court evidently disagreed with that decision, it did recognize that its views might be contrary to those of the United States Supreme Court which will be enunciated in its review of the Barlow decision. Oral argument of the Barlow decision is presently scheduled for the October Term of the United States Supreme Court. If no stay is entered, and if the Supreme Court affirms that decision or decides that OSHA's inspection provisions are unconstitutional for other reasons, this Court will have compelled Northwest to have submitted to an unconstitutional search.

8. Absent the issuance of a stay there is the additional danger of concurrent and conflicting regulation of the same working conditions by the FAA and OSHA during the pendency of the appeal. The undesirability and danger of such overlapping regulatory schemes is self-evident, and an order should be entered staying this Court's order pending the hearing and determination of the appeal therefrom.

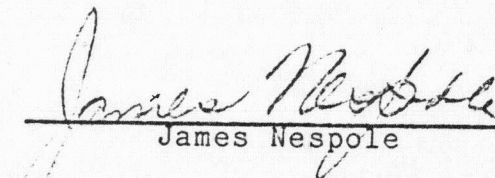
REARGUMENT AND RECONSIDERATION

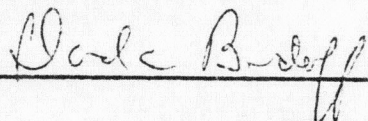
9. The FAA has extensively regulated the working conditions of Northwest's employees. It is unnecessary to recount the breadth of the regulation by the FAA, and the concomitant execution by the FAA of its authority to regulate. The Court is respectfully directed to the affidavit of William E. Huskins, Jr., submitted in opposition to plaintiff's application, for an analysis of this regulation. It is significant to

note at this juncture, however, that the pervasive regulation by the FAA underscores the obvious jurisdictional conflict which presently exists between OSHA and the FAA. Moreover, the FAA has not chosen to abdicate its authority to regulate. Under such circumstances, it is unnecessary for Northwest to exhaust its administrative remedies, remedies which may prove non-existent or inadequate. Thus, in the event that an inspection is conducted pursuant to a warrant which may not have been issued upon probable cause since plaintiff does not possess the authority to conduct such a search, no remedy would be available to Northwest to redress the deprivation of its constitutional right to be free from a search in violation of the Fourth Amendment of the United States Constitution. Consequently, Northwest should be allowed to initially question before this Court plaintiff's authority to conduct a search of its premises.

WHEREFORE, it is respectfully requested that Northwest's motion be granted in all respects.

Sworn to before me
this 20th day of June, 1977.


James Nespole


DAVID C. BIRDOFF
Notary Public, State of New York
No. 30-5323315
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1978

Memorandum and Order dated July 5, 1977 of
Hon. Edward R. Neaher, U.S.D.J. Denying
Defendant's Motion for Re-argument and Re-
consideration to Vacate the Court's Order
of June 10, 1977, etc.

DCB

→ files RECORDED

A 143

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- -x
:
W. J. USERY, JR., Secretary of
Labor, United States Department :
of Labor, :
:
Plaintiff, :
:
-against- :
:
NORTHWEST ORIENT AIRLINES, INC., :
:
Defendant. :
----- -x

76 C 2177

MEMORANDUM ORDER

Defendant seeks leave to reargue the court's order of June 10, 1977 directing the United States Magistrate to reinstate an inspection warrant requested by plaintiff. Defendant also seeks to stay the operation of the order pending determination of defendant's appeal to the Court of Appeals. Plaintiff opposes the motion for reargument but does not oppose the requested stay.

Upon consideration of the papers submitted by defendant in support of its motion, the court finds nothing of relevance which it overlooked in reaching its decision of June 10, 1977.

Accordingly, defendant's motion for reargument is denied. In the absence of opposition to the request for a stay, the operation of the order of June 10, 1977 is stayed pending determination of defendant's appeal to the Court of Appeals.

SO ORDERED.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: July 5, 1977
Brooklyn, New York

Notice of Appeal dated June 13, 1977 Denying
Defendant's Motion for Re-Argument and Re-
consideration to Vacate the Court's Order of
June 10, 1977, etc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
W. J. USERY, JR., Secretary of Labor,
United States Department of Labor,

Plaintiff,

-against-

NORTHWEST ORIENT AIRLINES, INC.,

Defendant.
-----X

: 76 Civ. 2177
: (ERN)
:

: NOTICE OF APPEAL
:

S I R S :

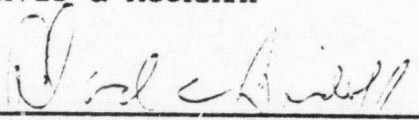
PLEASE TAKE NOTICE that defendant Northwest Airlines, Inc., incorrectly named herein as Northwest Orient Airlines, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the order of this Court, dated July 5, 1977, and entered in the Office of the Clerk of the United States District Court for the Eastern District of New York on July 6, 1977, which denied defendant's motion for reargument of the prior motion by plaintiff for an order which, inter alia, directed the reinstatement of a warrant issued by Magistrate Vincent Catoggio on November 4, 1976, permitting the inspection of Hangar No. 1, John F. Kennedy International Airport, Queens, New York, which motion was granted

by order of this Court, dated June 10, 1977, and entered in the Office of the Clerk of this Court on June 11, 1977.

DATED: New York, New York
July 13, 1977

REAVIS & McGRATH

By



A Member of the Firm
Attorneys for Defendant
345 Park Avenue
New York, New York 10022
(212)752-6830

TO: Francis V. LaRuffa, Esq.
Stephen D. Dubnoff, Esq.
Peter Van Scharck, Esq.
U.S. Department of Labor
Attorneys for Plaintiff
1515 Broadway
New York, New York 10036

Stipulation and Order Consolidating Appeals
77-6103 and 77-6112.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
W. J. USERY, JR., Secretary of Labor, :
United States Department of Labor, :
Appellee, :

Docket Nos. 77-6103
and 77-6112

-against-

STIPULATION AND ORDER
CONSOLIDATING APPEALS

NORTHWEST ORIENT AIRLINES, INC.,

Appellant. :
-----x

IT IS HEREBY STIPULATED AND AGREED, by and between the under-
signed attorneys for the respective parties herein, that the appeal
from a memorandum decision and order of the United States District Court
for the Eastern District of New York, Judge Edward R. Neaher, dated
June 10, 1977, Docket No. 77-6103, and the appeal from the memorandum
decision and order of the United States District Court for the Eastern
District of New York, Judge Edward R. Neaher, dated July 5, 1977, be and
the same are hereby consolidated for briefing and argument under
Docket No. 77-6103.

Dated: New York, New York
August 12, 1977

Reavis & McGrath

By

James Nespole
JAMES NESPOLE

A Member of the Firm
Attorneys for Appellant
Northwest Airlines, Inc.
345 Park Avenue
New York, New York 10022
(212) 752-6830

U. S. Department of Labor

By *Nancy L. Southard*
Nancy L. Southard

Attorneys for Appellee, W.J. Usery, Jr.
U. S. Department of Labor, Room S4004
Washington, D.C. 20210
(202) 523-6640

SO ORDERED:

Ellsworth A. Van Graafeiland
U.S.C.J.
ELLSWORTH A. VAN GRAAFEILAND
9-13-77

Letter dated January 13, 1977 from James
Nespole to Hon. Edward R. Neaher, U.S.D.J.

January 13, 1977

The Honorable Edward R. Neaher
United States District Judge
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: W. J. Usery, Jr., Secretary of
Labor v. Northwest Orient Airlines,
Inc., 76 Civ. 2177 (E.R.N.)

Dear Judge Neaher:

We are the attorneys for the defendant in the above matter in which the plaintiff applied for an inspection order pursuant to Section 8 of the Occupational Safety and Health Act of 1970 (the "Act"). Your Honor heard our argument on that application on December 20, 1976. It was our position that the matter had been determined by OSHA Administrative Law Judge Ditore and was to be reviewed by the full Commission, that as a matter of judicial economy this Court should not grant the motion and that the Fourth Amendment of the United States Constitution imposes upon OSHA the duty to establish at the time a request for a search warrant is made that it has the statutory authority to subject Northwest to a general search.

We wish to bring to your attention an unpublished judgment and memorandum decision and order dated December 30, 1976 of a Three-Judge Court of the United States District Court for the District of Idaho in an action entitled Barlow's, Inc. v. W.J. Usery, et al., Civ. No. 1-76-3 (copies attached) which has bearing on the right of OSHA to conduct a search in our case. In the appended case the Three-Judge Court permanently enjoined the Secretary of Labor from conducting or attempting to conduct, without a search warrant, any searches or inspections of the employee's premises. The basis for the

The Honorable Edward R. Neaher
January 13, 1977
Page 2

Court's determination was that Section 8(a) of the Act was unconstitutional "in that it directly offends against the prohibitions of the Fourth Amendment of the Constitution of the United States."

In our brief we urged that the Secretary of Labor must comport himself in a manner consistent with the Fourth Amendment when he requests that the Court issue a search warrant. (Brief of Northwest Airlines, Inc., pp. 23-38.)

The Court in Barlow's noted with respect to the Secretary's contention that Congress had designated OSHA to be the exclusive forum to hear an employer's objection to a search:

"The issue presented is one of constitutional law only and, further, the plaintiff is placed in a dilemma of being forced to give up his asserted right of privacy or potentially finding himself in contempt of court."

The Court's determination appears to be pertinent as the most recent judicial pronouncement respecting the Secretary's purported authority to conduct a nonconsensual inspection.

Respectfully,

James Nespole

Enclosures
cc: Francis V. LaRuffa, Esq.

JN:ceg

Letter dated February 4, 1977 from Francis V.
La Ruffa to Hon Edward R. Neaher, U.S.D.J.

U. S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
1515 BROADWAY
NEW YORK, NEW YORK 10036

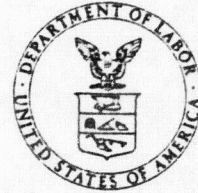
A 151

REPLY REFER TO:

SOL:PvS:bam

Tel. 212 399 5921

February 4, 1977



The Honorable Edward R. Neaher
United States District Court
Eastern District of New York
United States Courthouse
225 Cadmen Plaza East
Brooklyn, New York 11201

Dear Judge Neaher:

Re: Usery v. Northwest Orient Airlines, Inc.
Civil Action No. 76 CIV 2177

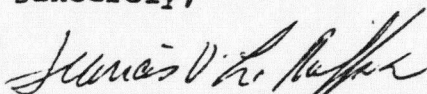
We wish to bring to Your Honor's attention a decision and order of the Honorable Justice William H. Rehnquist which might have a bearing on the above captioned matter which is currently before Your Honor. At the oral argument on this application before Your Honor on December 20, 1976, it was our position that the Secretary of Labor has the authority to inspect defendant's workplace without delay to protect the health and safety of defendant's workers. We also argued that the Secretary need not show that the defendant was a covered employer under the Act prior to the conduct of an inspection, and that the employer could only raise its exemption defense before the administrative agency charged with that specialized function.

On January 13, 1977, defendants brought to your attention an action entitled Barlow's, Inc., v. W. J. Usery, Jr., et al., in which a Three-Judge District Court of the United States District Court for the District of Idaho enjoined the Secretary of Labor from conducting further investigations pursuant to section 8(a) of the Act. Subsequently, however, the Honorable William H. Rehnquist, stayed the application of the judgment of the Three-Judge District Court, except as it applies to appellee Barlow's, Inc., pending a final decision on the merits by the Supreme Court. Attached is a copy of the Order and Opinion.

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Please note that in his opinion, Justice Rehnquist states that "[i]n such a situation, where the decision of the District Court has invalidated a part of an Act of Congress, I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court."

Sincerely,



Francis V. LaRuffa
Regional Solicitor

cc: James Nespole, Esq.
Reavis & McGrath

